LAW AND CONTEMPORARY PROBLEMS

ALCOHOLIC BEVERAGE CONTROL

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SCHOOL OF LAW • DUKE UNIVERSITY

VOL. VII AUTUMN, 1940 No. 4

LAW AND CONTEMPORARY PROBLEMS

A QUARTERLY PUBLISHED BY THE DUKE UNIVERSITY SCHOOL OF LAW

VOLUME VII AUTUMN, 1940 NUMBER 4

CONTENTS

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MONTHS OF ISSUE: JANUARY, APRIL, JUNE, AND OCTOBER

Subscription Price, $2.50 per Annum Foreign Subscriptions, $3.00 $1.00 per Number

(A supply of copies of each issue is provided to fill orders for single numbers)

Address all communications to LAW AND CONTEMPORARY PROBLEMS
DUKE STATION, DURHAM, NORTH CAROLINA

Entered as second-class matter, October 27, 1934, at the post office at Durham, North Carolina under the Act of March 3, 1879.

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VOLUME VII | AUTUMN, 1940 | NUMBER 4

FOREWORD

That the alcoholic beverage industry is the most thoroughly regulated of all industries is accepted as a truism. What is comprehended by this assertion may not be so universally appreciated. First, it involves denominating as an "industry" the distillers, brewers, wine makers, rectifiers, importers, and wholesalers, as well as those who deal directly with the consumer of alcoholic beverages. Furthermore, "regulated" indicates a control (extending to proprietary management) participated in by all levels of government from the municipal to the federal, each, perhaps, acting with some degree of independence. Finally, it must be realized that governmental regulation on all these levels may be concerned both with social control of liquor and the securing of revenue, and the achievement of these two ends may be assigned to different agencies. The statutes, ordinances, and administrative regulations under which the industry operates, accordingly, seem innumerable; but, against a background of the experience prior to Repeal, this symposium attempts to treat the more significant legal and administrative problems revealed by the experience of the last seven years.

It is recognized, of course, that the importance of studying alcoholic beverage control will be apparent to those directly concerned, either as regulators or as the subjects of regulation. It is natural, also, that there should be interest on the part of those concerned with promoting temperance and the prevention of the sale of alcoholic beverages, although, necessarily, the symposium has not dealt with the social problems centering around the consumption of such beverages. It is believed, however, that the analyses of the controls exercised over the liquor industry have a significance which transcends the subject of alcoholic beverages itself. Governmental control over all economic activity is increasing. It is obvious that much can be learned by both government and business from what has taken place in the most rigidly controlled and comprehensively regulated industry.

The titles of the articles in the symposium are sufficiently revealing of the contents. A planned article on self-regulation in the distilled spirits industry was not available due to circumstances beyond the control of the periodical. The recent abolition of the Federal Alcohol Administration and the transfer of its functions to the Alcohol Tax Unit of the Bureau of Internal Revenue makes it appropriate to call attention to the article by Mr. John E. O'Neill on "Federal Activity in Alcoholic Beverage Control." Mr. O'Neill's article describes the new federal organization and goes into detail as to the administrative procedure now prevailing.

PAUL H. SANDERS.

ALCOHOI IC BEVERAGE CONTROL BEFORE REPEAL

Clark Byse*

The adoption of the Twenty-first Amendment on December 5, 1933 terminated the experiment in national prohibition and established a new liquor control policy within the framework of which federal and state governments were to regulate the manufacture, distribution, and sale of intoxicating beverages. Post-Repeal liquor control legislation followed no uniform pattern; the states utilized the control systems of prohibition, state monopoly, and licensing, while the Federal Government established the Federal Alcohol Administration to regulate phases of the liquor traffic that could not be controlled effectively by the states. Legislators seeking to incorporate intc those systems the most effective control devices and to avoid the errors of the past looked to the rich history of previous legislative attempts to cope with the liquor problem. The purpose of this paper will be to sketch the salient features of pre-Repeal control systems and to suggest briefly the meaningful lessons that may be learned from the history of American liquor control before Repeal.

Control Over Retailers of Alcoholic Beverages[1]

American legislative attempts to regulate the retail trade in alcoholic beverages have almost invariably been based upon a system of licensing. Patterned after contemporaneous English liquor regulation, colonial control legislation generally required retail liquor sellers to secure licenses.[2] Colonial legislatures sometimes granted licenses, but usually this power was delegated to the governor, lieutenant governor, local courts, or town councils.[3] In some colonies, the number of licenses that could

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[1] There were two classes of liquor retailers: (1) those who sold for on-premise consumption, proprietors of taverns and saloons; (2) those who sold for off-premise consumption, usually grocers and druggists. This section of the paper will emphasize the former because (1) colonial and state legislation detailedly regulated their sales and practices, while off-premise vendors were comparatively unrestricted, and (2) sales for on-premise consumption constituted a much graver threat to the welfare of society than did sales for off-premise consumption.

[2] On the English experience, see Webb, The History of Liquor Licensing in England (1903) 1-48; Porritt, *Five Centuries of Liquor Legislation in England* (1895) 10 Pol. Sc. Q. 615.

[3] 1 Del. Laws (1700-1792) 193 (governor); Pa. Acts (1775) 59, passed in 1710 (lieutenant governor) [the gubernatorial licensing power was only nominal, licenses being issued as a matter of course to those applicants who were recommended by the local court. See Sites, Centralized Administration of Liquor Laws (1899) 36-38]; N. C. Laws 1741, c. 20, §4 (court); R. I. Acts 1711, 11 (town council). In Massachusetts, the General Court licensed public houses until 1644. Krout, The Origins of Prohibition (1925) 8, n. 22.

This compilation is of course not exhaustive. It is sufficient for a study of this nature to cite illustrative instances; that procedure has been followed in this footnote and it will be adhered to in subsequent citations.

be issued in certain counties, towns, or municipalities was established by statute.[4] In others, where no limit was fixed, the licensing agencies were generally very liberal in granting licenses to applicants who were "fit and suitable," paid the necessary license fee, and posted a bond which was conditioned upon compliance with the liquor regulations of the colony.[5] Some licensing agencies were so liberal that the legislature found it necessary to direct them "to take special care for the suppressing and restraint of the exorbitant number of ordinaries and tipling houses in their respective counties, and not to permit in any county more than one or two."[6] Violation of the liquor laws by a licensee might involve a fine, forfeiture of his bond, revocation or suspension of his license, refusal of a renewal license, or a combination of these penalties, depending upon the nature of the offense and the number of times the licensee had transgressed.[7]

Public houses—variously termed "ordinaries," "inns," or "taverns"—at which travelers were lodged and liquor was sold for on-premise consumption were the chief dispensers of intoxicating liquors and consequently were the principal objects of colonial liquor legislation. Vendors who sold for off-premise consumption were obliged to comply with some of the rules governing the keeper of a public house, but the latter was subject to a much more pervasive control. In addition to securing a license and posting a bond, the public house proprietor was compelled to comply with a host of restrictive requirements.

His prices were fixed by the legislature or the courts.[8] Because tavernkeepers often evaded price-fixing regulations by adulteration and short measure, colonial legislatures prescribed standards of measure and interdicted the "fraudulent corrupting and mixing of wines and strong waters."[9] The prices established by the price-fixing agency were to be "set up in the most public room of his, her, or their houses."[10] Sales to minors, slaves, and servants were not allowed, but this prohibition could generally be removed by the consent of the parent, owner, or master.[11] No drinks could be served to "tavern-haunters [whose names] were to be posted at the Door of every Tavern in the same town,"[12] and because many Rhode Island tavern-haunters evaded this restriction by going to neighboring towns, the legislature provided that tavern-haunters should also be posted in as many neighboring towns as the magis-

[4] 2 N. H. LAWS (1702-1745) 198; MASS. COL. LAWS (1672-1686) 351; Howie, *Three Hundred Years of the Liquor Problem in Massachusetts* (May, 1933) 18 MASS. L. Q. 79, 109.

[5] KROUT, *op. cit. supra* note 3, at 12.

[6] 2 VA. LAWS (Hening, 1660-1682) 269; see also 1 N. H. LAWS (1679-1702) 454.

[7] CONN. ACTS AND LAWS (1784) 243; 1 DEL. LAWS (1700-1792) 194; MD. LAWS (1780) c. 24, §7; MASS. COL. LAWS (1672-1686) 81; 3 VA. LAWS (Hening, 1682-1710) 398.

[8] MASS. COL. LAWS (1672-1686) 80, 251 (legislature); 1 VA. LAWS (Hening, 1619-1660) 300 (legislature); N. C. Laws 1741, c. 20, §7 (court); PA. ACTS (1775) 88, passed in 1718 (court; in Philadelphia, the mayor, recorder, and aldermen).

[9] THOMANN, COLONIAL LIQUOR LAWS (1887) 49. See also 1 VA. LAWS (Hening, 1619-1660) 300; 2 *id.* (1660-1682) 112-113; PA. ACTS (1775) 40, 47, passed in 1705.

[10] 1 DEL. LAWS (1700-1792) 196; Va. Acts 1769, 241.

[11] CONN. ACTS AND LAWS (1784) 241; MD. LAWS (1780) c. 24, §17; 1 N. H. LAWS (1679-1702) 36, 117. The restriction against sales to servants and slaves was based partly upon a desire to prevent time-wasting by those classes and partly upon fears of a slave insurrection. KROUT, *op. cit. supra* note 3, at 17.

[12] CONN. ACTS AND LAWS (1784) 242; R. I. LAWS (1798) 394, passed in 1721.

trates thought necessary.[13] Some colonies provided that liquor debts could not be recovered in the courts while others limited the amount of credit that could be extended.[14] Tavernkeepers were not to serve drinks, except to travelers, after nine o'clock in the evening[15] or on the Sabbath[16] and they were to prevent drunkenness, gambling and disorderly conduct in their establishments.[17] Some innkeepers were not to sell "above halfe a pinte of wyne for one person at one time" or to permit "tipling above the space of halfe an houre."[18]

Tavernkeepers were also required to provide "convenient lodging and diet for travellers, and pasturage, fodder, provender and stableage for horses."[19] The requirement was imposed not as a restrictive regulatory measure but for the purpose of encouraging colonial commerce and travel. The same reason induced some legislatures to encourage the establishment of inns by providing that the innkeeper should be the sole seller of liquors in the particular district in which the inn was located.[20]

Revenue considerations also weighed heavily with the colonial legislator. A wide range of governmental activities had to be supported and the liquor traffic was required to contribute by paying fees, excises, and duties. The taxing power was also used to promote the economic development of the colonies and the empire. Duties were imposed on imported liquors "except alwaise what shall come directly from England."[21] Some colonies, desiring to encourage domestic liquor production, levied discriminatory duties against liquor imported from neighboring colonies.[22] Apparently no consideration was given to using the taxing power to promote tem-

[13] R. I. LAWS (1798) 395, passed in 1725.

[14] MASS. COL. LAWS (1672-1686) 271 (no liquor debts recoverable); 1 VA. LAWS (Hening, 1619-1660) 287 (no liquor debts recoverable); repealed 1 *id.* 295; PA. ACTS (1775) 104, passed in 1721 (limited to 20 shillings); *cf.* CONN. ACTS AND LAWS (1784) 243 (all actions must be brought within two days of the sale). And see Johnson and Kessler, *The Liquor License System—Its Origin and Constitutional Development* (1938) 15 N. Y. U. L. Q. REV. 210, 230 (in Maryland, licensees were required to sell on credit).

[15] CONN. CODE (1650) 59; MASS. COL. LAWS (1672-1686) 80.

[16] 2 N. H. LAWS (1702-1745) 196. Massachusetts required "all Taverners . . . that are within one mile of the meeting-house [to] clear their houses of all able to go to Meeting," and Pennsylvania prohibited tipling on Sunday but permitted tavernkeepers to furnish "victuals and drink in moderation for refreshment only." MASS. COL. LAWS (1672-1686) 83; PA. ACTS (1775) 25, passed in 1705.

[17] 1 DEL. LAWS (1700-1792) 193; PA. LAWS (1738) 96; 1 MASS. ACTS (1692-1714) 57, 154.

[18] CONN. CODE (1650) 58; MASS. COL. LAWS (1672-1786) 81. Both colonies later extended the tipling period to one hour. CONN. ACTS AND LAWS (1784) 242; 1 MASS. ACTS (1692-1714) 154. In New Hampshire, the permissible period was two hours. 2 N. H. LAWS (1702-1745) 196.

[19] 3 VA. LAWS (Hening, 1682-1710) 396. In Maryland, this requirement was enunciated in greater detail: "Every ordinary-keeper . . . shall . . . be obliged to provide and maintain (if such ordinary be kept at the court-house in any county) six good feather beds, more than sufficient for the private use of such ordinary-keeper, with sufficient covering for the same, and Indian corn, oats, hay, straw, and stabling, for ten horses at least; and if at any place in the county other than the court-house, three spare beds, with covering, and sufficient stabling and provender for six horses at least. . . ." MD. LAWS (1780) c. 24, §5. See also CONN. CODE (1650) 61; Duke of Yorke's Laws 1676, 31.

[20] Johnson and Kessler, *loc. cit. supra* note 14.

[21] 3 VA. LAWS (Hening, 1682-1710) 88; N. C. Laws 1752, c. 1, §5.

[22] N. C. Laws 1751, c. 6: "Whereas, the inhabitants of Anson County do make quantities of strong liquors sufficient for their own use . . . be it enacted . . . that every importer of wine, rum and other spirituous liquor from South-Carolina into Anson County shall pay as a duty. . . ." *Cf.* 2 N. H. LAWS (1702-1745) 361 (imposing duties upon all imports of wine and rum and upon all exports of boards and fish) with 2 MASS. ACTS (1715-1741) 230 (retaliating against the New Hampshire law by imposing duties upon "every hogshead of rhum that shall be imported from the province of New Hampshire. . . .").

perance. Insofar as the imposition of fees, excises, and duties increased the cost of alcoholic beverages and thus discouraged consumption by making liquor more difficult to obtain, the taxing policy was restrictive in effect; but there are few, if any, indications that colonial legislatures consciously used the taxing power for purposes of restrictive social control.

Despite the pervasive control imposed upon liquor sellers, colonial liquor regulation was not designed to interfere with deeply rooted social customs. The use of liquor was generally approved and the colonial legislator did not desire either to discourage or prohibit the consumption of liquor.[23] His main purposes were to suppress public disorder and drunkenness, prevent profiteering and adulteration by tavernkeepers and time-wasting by servants and slaves, encourage domestic and empire liquor production, facilitate colonial commerce and travel, and secure an adequate revenue for colonial treasuries.

The pattern of colonial liquor control was not perceptibly altered after the establishment of the federal union. The colonial opinion that moderate use of intoxicants was helpful and stimulating continued to prevail. But gradually the temperance societies which opposed the use of intoxicants except for medicinal purposes succeeded in changing the popular attitude.[24] As a result, several states enacted prohibitory laws in the eighteen thirties and forties[25] and licensing restrictions became more numerous and onerous.

Some restrictions that originated in the colonies were also imposed upon the saloonkeeper of the nineteenth and twentieth centuries. Sales on Sundays, or after closing hours, or to minors, habitual drunkards, and intoxicated persons were prohibited in practically every state.[26] Gambling in saloons and sales on credit were also forbidden.[27] A few states preserved the provision that sales for on-premise consumption should be limited to establishments able to furnish lodging for travelers,[28] but this requirement which was a distinctive feature of colonial control systems was not generally retained after the first half of the nineteenth century. Legislative determination of the number of outlets and judicial or legislative price fixing were also abandoned by most states.[29] Other restrictive measures prohibited the employment of women or minors and provided that saloons should not be operated within certain distances of schools, churches, and public parks and should be closed on election

[23] CHERRINGTON, THE EVOLUTION OF PROHIBITION IN THE UNITED STATES (1920) 11. See also Howie, *supra* note 4, at 110.

[24] COLVIN, PROHIBITION IN THE UNITED STATES (1926) c. 1.

[25] See *infra*, p. 558.

[26] See CYCLOPEDIA OF TEMPERANCE AND PROHIBITION (1891) 275-360; and Osborn, *Liquor Statutes in the United States* (1888) 2 HARV. L. REV. 125, for a digest of state liquor laws.

[27] *Ibid.*

[28] DEL. CODE (1915) §161 (not applicable to licensees in towns of over 2,000 inhabitants); N. Y. Laws 1857, c. 629.

[29] But see KY. STAT. (1873) c. 106, art. I, §11 (county court to fix prices). Limitation of outlet legislation was, however, later enacted by several states. See, *e.g.*, Mass. Laws 1888, c. 340 (one licensee for every 1,000 population; in Boston, one to every 500); Ohio Laws 1913, no. 108, §24 (one saloon for every 500 population; on petition of 35 percent of voters, election to be held to determine whether the number of saloons should be further limited).

days and holidays.[30] Less frequently the statutes prohibited indecent pictures, games, music, sales to women, the use of screens, curtains, and blinds to obstruct a clear view of the interior of the premises, and the practice of "treating."[31]

A substantial number of states further burdened the dispenser of intoxicating beverages by enacting civil damage acts.[32] One form of these statutes gave a right of action against the liquor dealer and his lessor to persons damaged because of the intoxication of persons supplied with liquor by the dealer. Another form provided that liquor sellers who sold intoxicants to an habitual drinker, contrary to instructions from the drinker's relatives, should pay the latter a statutory penalty. These laws differed in detail but their underlying purpose was the same: to impose upon the liquor dealer responsibility for some of the consequences of his traffic. Although many wives were reluctant to bring suit either because of the uncertainties and expense of litigation or because husbands "persuaded" them not to do so, these statutes did have a wholesome effect in deterring saloonkeepers from engaging in activities that would subject them and their bondsmen to liability under the civil damage acts.[33]

Several states created still another weapon to be used in suppressing the illegal liquor traffic by providing that the unlawful sale of intoxicants constituted a nuisance which could be enjoined; these statutes also authorized the abatement of the nuisance by the removal and sale or destruction of the liquors and the closing of the building for a given period.[34] The advantages of this procedure were that a hostile jury could not thwart the statutory policy by refusing to convict and that equitable proceedings, usually being more expeditiously administered than criminal proceedings, permitted a speedy disposition of liquor cases.

Practically every person who retailed intoxicating liquors was required to secure a license from the proper licensing agency.[35] The underlying theory of a license

[30] *Loc. cit. supra* note 26. Some southern states, instead of prohibiting sales within 200, 300, or 400 feet of schools, as was commonly done by northern states, enacted special laws banning sales within one, two, three, or four miles of a particular school, thereby imposing prohibition upon the surrounding community. See, *e.g.*, Ark. Laws 1881, nos. 9, 10, 11, 20, 30, 34, 55, 64, 91; and see no. 74, providing that if a majority of the adult inhabitants residing within three miles of any school should petition that liquor sales be prohibited within three miles of the school, the county court should so order. See also *infra*, p. 558.

[31] IOWA CODE (1897) §2448 (prohibiting indecent pictures, games and music); R. I. Pub. Laws 1889, c. 816, §12 (prohibiting sales to women); DEL. CODE (1915) §183 (anti-screen provision); NEB. COMP. STAT. (1889) c. 50, §31 (anti-treating provision); and see Woods, *License in Place of Licensing* (1916) 36 SURVEY 635.

[32] Lawson, *The Civil Remedy for Injuries Arising from the Sale or Gift of Intoxicating Liquors*, published in BOOK OF MONOGRAPHS (1877); BLACK, INTOXICATING LIQUORS (1892) c. 13; Vicars, *Construction of the Illinois Dram Shop Act Imposing Liability upon Tavernkeeper and His Lessor for Injuries Caused by Intoxicated Persons* (1939) 14 NOTRE DAME LAWY. 295.

[33] FANSHAWE, LIQUOR LEGISLATION IN THE UNITED STATES AND CANADA (*circa* 1894) 94.

[34] Rounds, *Injunctions Against Liquor Nuisances* (1896) 9 HARV. L. REV. 521; BLACK, *op. cit. supra* note 32, c. 14.

[35] Two states, however, did not in theory require a license. In Ohio, the constitution of which provided that "No license to traffic in intoxicating liquors shall . . . be granted in this State," and in Iowa, the statutes of which prohibited the sale of intoxicants, licenses were not granted, but "mulct laws" levied a tax upon all who sold alcoholic beverages. The payment of the tax did not constitute a license or legalize the business. In Iowa, upon compliance with certain other conditions [see IOWA CODE (1897) §2448], pay-

system being that licenses should be granted only to competent and trustworthy persons on such conditions as will protect the community from evils incident to the sale and consumption of liquor, the functioning and nature of the licensing authority is crucially significant. Despite the importance of selecting the best possible licensing agency, the licensing statutes contained a bewildering assortment of schemes. Some states vested the licensing power in the local governing body—county commissioners, city or village council, township board—or provided that the local governing body should appoint a licensing agency.[36] Other statutes placed the power in a commissioner or board appointed by the governor.[37] Still other states gave the licensing power to the courts.[38] Even within a single state there might be a variety of expedients.[39]

Other provisions pertaining to licensing liquor sellers exhibited the same variety of treatment. Most statutes gave the licensing agency a broad discretion to refuse licenses, but in some states licenses could only be refused for cause.[40] Sometimes the applicant had to secure the approval of the adjoining property owners, or of a majority of the freeholders within the licensing area or within three miles of the premises, or of a stated number of persons within the political unit in which the saloon was to be located.[41] Provisions for public notice of the application and opportunity for

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ment of the tax merely suspended the penalties that otherwise would have been imposed for an illegal sale; and in Ohio, failure to pay the tax merely subjected the defaulter's goods and chattels to levy and sale by the county treasurer. See WINES AND KOREN, THE LIQUOR PROBLEM IN ITS LEGISLATIVE ASPECTS (1897) 136-140, 292-299.

[36] R. I. PUB. LAWS (1896) c. 102, §§1-3; WASH. STAT. (Hill, 1891) §§2808, 2809; WIS. REV. STAT. (1878) §1548; WYO. COMP. STAT. (1901) §2833.

[37] 2 MO. REV. STAT. (1909) c. 63, art. II (in cities over 300,000 an excise commissioner appointed by the governor grants licenses); MASS. PUB. STAT. (1882) c. 100, §26, Mass. Laws 1885, c. 323 (Boston board of police which grants licenses is appointed by the governor); N. H. Laws 1903, c. 95 (governor appoints a state board which grants licenses). See also Ohio Laws 1913, no. 108 (establishing a state board to be appointed by the governor, the state board to appoint local licensing boards).

[38] KY. STAT. (1873) c. 106, art. I, §1; 2 PA. DIG. STAT. (Purdon, 1700-1903) Liquors, §17; TEX. REV. STAT. (1911) art. 7447; 2 VA. CODE (Pollard, 1904) 2254.

[39] See Koren, *The Status of Liquor License Legislation* (1913) 2 NAT. MUN. REV. 629, where it is stated at 631: "Perhaps no commonwealth furnishes a more perfect example of confused conditions relative to licensing authorities than New Jersey. There licenses to sell liquor may be granted: (1) By the court of common pleas; (2) by a city council, common council, board of aldermen or other governing body; (3) by an excise board appointed by the court of common pleas; (4) by an excise board elected by a city council or other governing body; (5) by an excise board nominated by a mayor and confirmed by a city council; and (6) by an excise board chosen at a general election. It is held, moreover, that when a city adopts the commission form of government under the new law, all power to deal with liquor licenses becomes vested in the commissioners. The statutes from which the different licensing bodies derive their existence date as far back as 1838 and reach down to 1911. It can hardly be maintained that New Jersey attempted to meet half a dozen essentially different conditions within her borders by as many varieties of licensing authorities. They appear largely to be the results of accident rather than of a well-conceived plan."

[40] FANSHAWE, *op. cit. supra* note 33, at 82-83, 288.

[41] Ga. Laws 1884, c. 422 (applicant must file written consent of ten "of the nearest *bona fide* residents, five of whom shall be freeholders, owning land . . . nearest to the place of business where" the liquors were to be sold); Mo. Laws 1883, 86, §4 (majority of assessed taxpaying citizens in the square or block in which the saloon was to be located had to sign a petition); Ind. Acts 1873, c. 59, §2 (applicant must file a petition signed by a majority of the voters in the town, township, or ward in which the saloon was to be located); Ga. Acts 1887, no. 189, *id.* 1889, no. 481 (requiring applicants in named counties to file a petition signed by two thirds of the freeholders residing within three miles of the premises or signed by two thirds of the freeholders residing within the corporate limits of towns or

remonstrance by interested parties were incorporated into some statutes and omitted in others.[42] Generally a bond—varying in amount from $250 to $6,000—conditioned upon compliance with the liquor laws and payment of civil damage act liabilities was required.[43] Violation of the liquor statutes usually involved, in addition to a fine and/or imprisonment, forfeiture of the license and disqualification for future licenses; but here again there were various provisions. In some cases, the licensing authority was given power to revoke the license of a licensee who had violated the liquor laws; in others it was required to do so; and in still others, the court was authorized to forfeit the license of a convicted licensee.[44] A person whose license had been revoked was thereafter disqualified from securing another license until a stated period had elapsed.[45]

Some statutes fixed a single fee for a single license that was to be issued to all sellers of intoxicants; others established several classes of licenses and fixed different fees for them.[46] Occasionally the amount of the fee depended upon the volume of the licensee's sales or upon the amount of stock on hand or intended to be kept on hand.[47] Several states, following the lead of Nebraska which in 1881 fixed a minimum annual fee of $500 for saloons in towns of less than 10,000 population and one of $1,000 for those in cities of more than 10,000, enacted so-called "high-license" laws.[48] These laws were originally sponsored by prohibitionists in the hope that they would decrease the drink traffic by eliminating a large number of sellers. It was also felt that a licensee who paid a high price for his privilege (a) would not risk its revocation by violating the restrictions imposed and (b) would assist in suppressing unlicensed

villages); DEL. REV. CODE (1915) §161 (twelve respectable citizens, half of whom shall be substantial freeholders, must petition).

[42] The remonstrance provisions varied considerably. In Pennsylvania [2 PA. DIG. STAT. (Purdon, 1700-1903) Liquors, §17], the licensing authority was to conduct a hearing (at which the remonstrants could present their objections) and then decide whether a license should be issued, while in Rhode Island [R. I. PUB. STAT. (1882) c. 87, §2], if the owners or occupants of the greater part of the land within 200 feet of the premises should object, no license could be issued, and in Mississippi [MISS. REV. CODE (1880) §1103], the petition of a majority of the legal voters resident in the supervisor's district or incorporated town against granting a license would prevent its issuance. A similar Kentucky statute [KY. STAT. (Carroll, 1909) §4203] provided that the protests of a majority of the legal voters "in the neighborhood where the liquor is to be sold" would invalidate an applicant's petition; the licensing agency, which was the county court, was to determine what constituted the "neighborhood." In Massachusetts [1 MASS. REV. LAWS (1902) c. 100, §15], the written objection of any owner of real estate within 25 feet of the premises described in the application was sufficient to prevent the issuance of a license.

[43] Osborn, *supra* note 26, at 131.

[44] ILL. REV. STAT. (Hurd, 1887) c. 43, §4 (licensing agency authorized but not required to revoke license); 1 WIS. STAT. (Sanborn & Berryman, 1889) §1559 (licensing agency required to revoke license for violation of liquor laws); 2 PA. DIG. STAT. (Purdon, 1700-1903) Liquors, §17 (court required to revoke license); see *In re* Carlson's License, 127 Pa. 330, 18 Atl. 8 (1889); BLACK, *op. cit. supra* note 32, §§189-197; FANSHAWE, *op. cit. supra* note 33, at 87.

[45] 1 MASS. REV. LAWS (1902) c. 100, §47 (one year); R. I. Laws 1889, c. 816, §11 (five years); 1 MO. REV. STAT. (1899) §3013 (no license to be issued to person whose license has once been revoked).

[46] Vt. Acts 1902, no. 90, §23 (7 classes); N. H. Laws 1903, c. 95, §6 (8 classes); 1 MASS. REV. LAWS (1902) c. 100, §18 (7 classes). In a few states, license fees could be determined by the voters at an election held for that purpose. See *e.g.*, 1 WIS. STAT. (Sandborn & Berryman, 1889) §1548b.

[47] ARIZ. REV. STAT. (1887) §2239 (volume of sales); CALIF. POLIT. CODE (Deering, 1885) §3381 (volume of sales); MD. CODE (1888) Licenses, §§57-68 (amount of stock).

[48] 4 STANDARD ENCYCLOPEDIA OF THE ALCOHOL PROBLEM (1928) 1541-1547.

sellers. The prohibitionists soon turned against high license on the grounds that the payment of a high license fee was an incentive to stimulate sales and that the substantial revenue received from the license fees perverted the better judgment of prohibition-inclined voters. High license certainly did not accomplish all its sponsors hoped, but in the opinion of most observers the objectives of reducing the number of liquor sellers and of coercing a higher standard of action were partially achieved.[49]

The patchwork of pre-Repeal licensing legislation did not represent a satisfactory solution of the liquor problem.[50] Only rarely was there a recognition that the drink evil was primarily caused by the use of liquors in which the percentage of alcohol was comparatively high—the so-called hard liquors, particularly whisky. Consequently there was no appreciable effort to encourage the use of beer and light wines by legislation that discriminated in their favor and against hard liquors. At best, however, the system of licensing private retail liquor sellers was basically unsound for it did not remove the element of private profit. The objective of all liquor legislation should be the encouragement of temperance. Stimulation of liquor sales—an inevitable accompaniment of a licensing system based upon private profit—is incompatible with that goal. Further, the liquor problem became a recurring political issue that occupied the interest of the electorate to the exclusion of equally or more significant questions, often causing the election of incapable executive and legislative officials solely because of their views concerning the liquor question.[51] Finally, many restrictions were often violated with impunity because the liquor interests had sufficient political power to prevent prosecution. This "unholy alliance" between liquor and politics was usually most pronounced where the liquor traffic was regulated by the local governing agency, and public disapproval of it was a prime reason for the adoption of the Eighteenth Amendment.[52]

CONTROL OVER PRODUCERS AND DISTRIBUTORS OF ALCOHOLIC BEVERAGES

Liquor producers and distributors were comparatively free from the restrictive control imposed upon retailers. Some colonies regulated certain manufacturing processes (such as the Massachusetts prohibition against use of lead pipes by distillers), interdicted adulteration, and encouraged domestic liquor production.[53] State regulation did not go far beyond this. Licenses were usually required; and in securing the license, applicants were sometimes obliged to comply with provisions similar to those governing the issuance of retailer licenses, such as securing the approval of a stated number of electors.[54] Several statutes enabled a liquor producer to protect his brand name by filing it with the appropriate functionary,[55] and some states in which a

[49] FANSHAWE, *op. cit. supra* note 33, at 76. Compare HARRISON AND LAINE, AFTER REPEAL (1936) 194.

[50] Koren, *supra* note 39, at 634.

[51] *Report of the Committee on Liquor Control Legislation of the National Municipal League* (1934) 23 NAT. MUN. REV. 47, 50.

[52] See THE LIQUOR PROBLEM (Committee of 50, 1905) 75-78, and see *infra* p. 564.

[53] THOMANN, COLONIAL LIQUOR LAWS (1887) 34, 35, 69.

[54] See *e.g.*, DEL. CODE (1915) §185.

[55] 1 MD. LAWS (1903) art. 27, §297; 2 WIS. STAT. (Sanborn and Berryman, 1889) §4470a.

particular type of intoxicant was produced enacted legislation regulating its manufacture.[56] But the most pervasive regulation to which liquor producers were subject was that imposed by the Federal Government to ensure the collection of taxes levied upon producers of distilled spirits and fermented liquors.[57] The requirements concerning distillers (chosen at random from the United States Revised Statutes of 1875) that are listed in the footnote sufficiently illustrate the pervasive nature of internal revenue control.[58]

State and federal governments were fairly active in preventing adulteration and misbranding of intoxicating liquors. Early legislation prohibiting adulteration was sometimes directed specifically against the practice of adulterating intoxicants.[59]

[56] See *e.g.*, Calif. Laws 1887, c. 36, *id.* 1907, c. 104 (regulating manufacturing of wine); KY. STAT. (1909) §2572a (regulating certain distillery practices). *Cf.* WIS. STAT. (1913) §1557 (establishing standards and definitions for malt beverages).

[57] Federal taxation in this field consisted of (1) a relatively small annual "special tax" imposed upon producers and distributors and (2) an excise tax measured by the quantity of liquor produced. Internal revenue taxes were first imposed in 1791, repealed in 1802, re-enacted in 1813 to help defray the cost of the War of 1812, and repealed again in 1817. In 1862, because of Civil War expense, Congress enacted a comprehensive internal revenue bill, a portion of which imposed excise taxes on distilled and fermented liquors and a "special tax" upon producers and distributors.

A "special tax" was also imposed upon all retailers of intoxicating liquors. Many state statutes provided that payment of the United States tax as a liquor seller constituted *prima facie* evidence that the persons paying it were sellers of intoxicating liquors. Internal revenue records concerning the tax on retailers generally disclosed, especially in prohibition states, that large numbers of individuals, who according to state law could not legally sell liquor, paid the federal retailer tax. The only fair conclusion is that there was widespread violation of state liquor laws. See *infra* note 91, and see ROWNTREE AND SHERWELL, THE TEMPERANCE PROBLEM AND SOCIAL REFORM (7th ed. 1900) 131-134.

[58] Before a person could become a distiller, he had to file a notice of intention to carry on the business of distiller, specifying the kind of stills, the cubic contents thereof, and other pertinent information, and also file a bond conditioned that he would comply with the law, pay all penalties and fines, and not permit the land on which the distillery was situated to become encumbered during the time in which he carried on the distilling business (§§3259, 3260). He was required either to own in fee, unencumbered by any lien, the land on which the distillery was to be situated or to secure the written consent of the owners and any lienholders that the lien of the United States for taxes and penalties should have priority; if, for enumerated reasons, such consent could not be obtained, the applicant was to file a bond signed by not less than two sureties conditioned that if the distillery were forfeited for violation of the law, the obligors would pay the amount stated in the bond, which was to be equal to the appraised value of the land (§3262). Prior to the approval of his bond, the would-be distiller had to submit an accurate plan of the distillery and no alteration could be made in the distillery without the consent in writing of the collector of internal revenue (§3263). The building and plant had to conform to certain specifications established by Congress and some parts of the distillery were to be under the lock and seal of an officer of the internal revenue department (§3267). At any time of the night or day, any revenue officer could lawfully enter any distillery and it was the duty of the distiller to furnish him with all means necessary to inspect the premises (§3277). Every distiller was required to post a sign, "Registered Distillery," outside his place of business (§3279). It was illegal to operate any still between eleven p.m. Saturday and one a.m. Monday or to make any mash or remove any liquor in the absence of the government storekeeper (§§3283, 3284). Fermenting tubs could not be filled more often than was prescribed by law and liquor was drawn off, gauged, and marked subject to the regulations of the Commissioner of Internal Revenue (§§3285, 3287). These and other regulations (§3449) providing for the marking of liquor came to be regarded by the trade as a guarantee of the genuineness of the product. 3 STANDARD ENCY. OF THE TEMPERANCE PROBLEM (1926) 1329. This list of internal revenue requirements is by no means complete; it is sufficient however to illustrate its detailed character.

[59] *E.g.*, Pennsylvania in 1705 prohibited the adulteration of "rume, brandy, or such like spirits." PA. LAWS (Dunlop, 1700-1852) 56. See also THOMANN, COLONIAL LIQUOR LAWS (1887) *passim*.

Later enactments, including the Federal Food and Drugs Act of 1906,[60] were more comprehensive, being designed to prevent adulteration and misbranding of foods and drugs.[61] Inasmuch as the term "food" was almost invariably defined to include liquor, these laws regulated liquor manufacturing and labeling practices.[62] The procedure followed in administering these acts generally involved the adoption of definitions or standards to which the product and its label were to comply. In a few states, certain types of liquor were defined by statute, while in others, power to adopt definitions and standards was delegated to the enforcing officials.[63] In still others, the standards and definitions established by the Secretary of Agriculture were to be incorporated into the state law.[64] In fact, the Food and Drugs Act did not give the Secretary power to establish food standards; but he did promulgate advisory standards which satisfied the requirements of these state statutes.[65]

The most prominent Food and Drugs Act ruling concerning intoxicants involved the proper use of the term "whisky." The story of its promulgation merits telling, for it depicts the administration of the Food and Drugs Act in the alcoholic beverage field and presents a revealing sidelight on the character of President Taft who gave vent to his judicial temperament by participating in the administration of the Food and Drugs Act. Shortly after the adoption of the Act, the Department of Agriculture, which administered it, ruled that a mixture composed of 51 percent straight whiskies and 49 percent neutral spirits could not be labeled blended whiskies because such a label would be misleading.[66] A few months later, Attorney General Bonaparte, acting at the request of President Roosevelt, issued an opinion which approved the Department's ruling.[67] The opinion reasoned that neutral spirits were not whiskies and inasmuch as Section Eight of the Act defined a blend as a "mixture of like substances," a mixture of straight whisky and neutral spirits could not properly be labeled a blend. Such a mixture should be branded "Whisky. A compound of grain distillates."[68] The opinion also ruled that neutral spirits mixed with harmless coloring

[60] 34 STAT. 708 (1906).

[61] Conover, *National, State and Local Cooperation in Food and Drug Control* (1928) 22 AM. POL. SC. REV. 910; Salthe, *State Food, Drug and Cosmetic Legislation and Its Administration* (1939) 6 LAW AND CONTEMP. PROB. 165.

[62] The federal definition is illustrative: "The term 'food,' as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound." FOOD AND DRUGS ACT, §6.

[63] WESTERVELT, AMERICAN PURE FOOD AND DRUG LAWS (1912) contains a comprehensive digested compilation of the various food and drugs acts, and related legislation. See especially §§26, 28, 61.

[64] *Ibid.*

[65] Salthe, *supra* note 61, at 167.

[66] Food Inspection Decision 45 (1906) (hereinafter cited F. I. D.). Food Inspection Decisions are in the nature of expressions of opinion by the Department of Agriculture. The Department thus explained their status: "The opinions or decisions of this Department do not add anything to the rules and regulations nor take anything away from them. They therefore are not to be considered in the light of rules and regulations. On the other hand, the decisions and opinions referred to express the attitude of this Department in relation to the interpretation of the law and the rules and regulations. . . . They are . . . issued more in an advisory than in a mandatory spirit." F. I. D. 44 (1906), quoted in Hayes and Ruff, *The Administration of the Federal Food and Drugs Act* (1933) 1 LAW AND CONTEMP. PROB. 16, 20.

[67] 26 OPS. ATTY. GEN. 216 (April 10, 1907).

[68] *Id.* at 228-231. This ruling was qualified by the requirement that the neutral spirits be distilled from grains and that there be "enough whisky in [the mixture] to make it a *real* compound and not

and flavoring substances so as to have the appearance and flavor of whisky should be labeled "Imitation whisky." These rulings were approved by President Roosevelt who directed the Secretary of Agriculture to administer the Act in accordance therewith.[69] Distillers who were thus obliged to use the labels "Imitation whisky" and "Whisky. A compound of grain distillates," contrary to trade practices that had to some extent prevailed for many years,[70] induced the Attorney General to grant a hearing concerning the correctness of his opinion, but the earlier decision was not changed.[71] Approximately nine months later, on February 19, 1909, the Attorney General rendered a third opinion in which he re-affirmed the conclusions of his earlier decisions.[72] A few weeks later Mr. Taft became President, and the distillers immediately appealed to him. The President referred the question to Solicitor General Bowers who conducted a hearing and submitted an opinion.[73] President Taft then took sufficient time from his executive duties to hear arguments on the correctness of the Solicitor General's findings, to read "with care the entire evidence adduced,"[74] and to write and issue what is known as the Taft Report.[75] The President maintained that the question was "one of correct branding to prevent deception of the public as to what it was buying" and he concluded that it was the understanding of the trade and of consumers that the term whisky "included all potable liquor distilled from grain."[76] Therefore neutral spirits which were distilled from grain and which were colored and flavored with harmless substances in the customary manner were entitled to be labeled whisky; and a mixture of neutral spirits distilled from grain and straight whisky could rightfully be labeled a "Blend of whiskies" because both substances were whiskies and a blend is a mixture of like substances. The Report also ruled that whisky should be so branded as to show exactly the kind of whisky it was. These Presidential rulings were accepted by both the Department of Agriculture and the trade, and apparently settled the question of how whisky

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the mere semblance of one." On December 7, 1908, the Attorney General ruled that "enough whisky" would be not less than one third by volume of straight whisky. F. I. D. 98 (1908).

[69] F. I. D. 65 (1907).

[70] Woolner & Co. v. Rennick *et al.*, 170 Fed. 662, 665 (C. C. S. D. Ill. 1908).

[71] 26 OPS. ATTY. GEN. 262 (May 29, 1907).

[72] 27 *Id.* 202 (Feb. 19, 1909). In this opinion the Attorney General cited two cases involving an internal revenue provision, Section 3449 of the Revised Statutes (making it illegal to ship, transport or remove any liquors "under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same") that sustained his position.

[73] *Report of the Solicitor General to the President upon Certain Questions Submitted to Him Concerning the Meaning of the Term "Whisky"* (1909), printed in FEDERAL FOOD AND DRUGS ACT AND DECISIONS (1914) 818.

[74] The hearing before Mr. Bowers was very extended; the testimony comprised 2,365 pages, in addition to a voluminous mass of documentary evidence.

[75] Taft, *What Is the Meaning of the Term "Whisky" Under the Pure Food Act and the Proper Regulations for Branding Various Kinds of Whisky Under the Internal Revenue Act?* (1909), printed in THORNTON, LAW OF FOOD AND DRUGS (1912) 450-461.

[76] The President also stated that ". . . straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and . . . therefore it is a perversion of the pure food act to attempt now to limit the meaning of the term 'whisky' to that which modern manufacture and taste have made the most desirable variety." THORNTON, *op. cit. supra* note 75, at 457.

should be labeled until some 25 years later when the adoption of the Twenty-first Amendment raised the problem anew.[77]

Consumer protection against adulterated and misbranded liquors given by the food and drugs acts was not paralleled by effective governmental action against price control by producers. Despite the Sherman Anti-Trust Act of 1890[78] and similar state constitutional and statutory provisions, some of which were in force before the federal enactment,[79] combinations of liquor producers kept liquor prices at relatively high levels.[80] From 1890 to the time of Repeal, the price of spirits was substantially higher than the general price level—in some years, more than 30 percent over the general index.[81] Failure of the appropriate enforcing officials to curb these combinations may perhaps be attributed to the political power of the liquor interests, for there is ample evidence of their political force.[82] Whatever the reason, there was a deplorable failure to prevent price fixing.

Another instance of governmental inability to control effectively the activities of producers and distributors is found in the so-called "tied-house" relationship between producers and distributors on one side, and retailers on the other. Under the tied-house arrangement, brewers, distillers, and wholesalers financed the establishment and/or maintenance of saloons and thereafter controlled the saloonkeeper they had assisted. Legislation against the tied-house system was occasionally enacted,[83] but it was not very effective.[84] Several undesirable consequences resulted from this tie-up between saloons and the liquor interests. Saloonkeepers were under a continual

[77] Some other distilled spirits labeling problems under the Food and Drugs Act were treated in the following: Regulatory Announcement of Jan. 25, 1916, printed in 1 Dunn, Food and Drug Laws (1927) 35 (the statement of quantity on the bottled-in-bond internal revenue stamp does not satisfy the requirements imposed by the amendment of March 3, 1913, 37 Stat. 732, that the quantity of the contents of any package shall be plainly and conspicuously marked on the outside thereof); Regulatory Announcement of Jan. 26, 1916, printed in 1 Dunn, *op. cit.*, at 54 (substances labeled or sold as "Scotch whisky" which are not manufactured in Scotland are deemed misbranded); F. I. D. 126 (1910) ("Canadian Club Whisky" is such a "distinctive" name under the provisions of Section 8, paragraphs 10 and 11, that it need not be labeled "A blend of whiskies"); United States v. 36 Bottles of London Dry Gin, 205 Fed. 111 (E. D. Pa., 1913) (jury question whether the use of the label "London Dry Gin" resulted in false branding as to the country in which the liquor was produced) *rev'd on other grounds*, 210 Fed. 271 (C. C. A. 3d, 1914).

[78] 26 Stat. 209 (1890).

[79] Legis. (1932) 32 Col. L. Rev. 347.

[80] Jenks and Clark, The Trust Problem (5th ed. 1929) 99-107. See also 1 Ind. Comm. Rep. 74 (1900); House Rep., No. 2601 (Mar. 1893); Jenks, *The Development of the Whiskey Trust* (1889) 4 Pol. Sc. Q., 296.

[81] Jenks and Clark, *op. cit. supra* note 80, at 107.

[82] Nat. Comm. on Law Obs. and Enf., *Report on the Enforcement of the Prohibition Laws of the United States*, H. R. Doc. No. 722, 71st Cong., 3d Sess. (1931) 6; Colvin, Prohibition in the United States (1926) 551 *et seq.*

[83] See *e.g.*, Iowa Laws 1894, c. 62, §17; Ohio Laws 1913, no. 108, §19. The Iowa provision prohibited any person from being surety on more than one liquor bond. Ohio was more thorough, providing: "License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought, and no other person shall be in any way interested therein during the continuance of the license. . . ."

[84] Nat. Comm. on Law Obs. and Enf., *loc. cit. supra* note 82; Grant, *The Liquor Traffic Before the Eighteenth Amendment* (Sept., 1932) 163 Annals 1, 4 (it was being charged at the time of the Eighteenth Amendment that 80 percent of the retail outlets were tied-houses).

pressure to stimulate sales, thus increasing consumption which often led to intemperance. The distiller or brewer, being an absentee owner, cared little for the social disruption that resulted from a policy of forcing saloonkeepers to stimulate sales; his interest was in increased sales, not in social welfare.[85] The tied-house system also resulted in the establishment of a great number of retail outlets because every producer felt that he had to have an outlet in each market. An excess of outlets meant a stimulation of sales, with resulting intemperance. The evils of the tied-house system and the corrupting political influence of the liquor interests were major causes for the adoption of national prohibition.[86]

GOVERNMENT MONOPOLY CONTROL

Government monopoly of the sale of liquor for general consumption originated in the United States in the college town of Athens, Georgia, in 1891.[87] During the next 25 years many other towns and counties in Alabama, Georgia, North Carolina, South Carolina and Virginia established similar municipal monopolies.[88] And in 1893, South Carolina instituted a statewide monopoly.[89] Under this plan, the state was to be the sole seller of liquors. A central wholesale dispensary was to be established; saloons were to be abolished and their place taken by retail dispensaries where

[85] See FOSDICK AND SCOTT, TOWARD LIQUOR CONTROL (1933) 43. As Captain W. S. Alexander, Administrator of the Federal Alcoholic Administration, succinctly observes, ". . . the fact remains that under the tied house system the retailer is not responsible to society. When someone else sets a licensee up in business, buys his license, furnishes him with a house to do business in and puts in the fixtures and his stock who is Lord and Master there—society or the man who pays for all this?" Address before the Nat. Alcoholic Beverage Control Ass'n, Aug. 24, 1938. FA-152.

[86] Nat. Comm. on Law Obs. and Enf., *loc cit. supra* note 82.

[87] 2 Ga. Acts 1890-1891, no. 345. A possible qualification of the statement in the text is that some prohibition states had earlier established quasi-governmental "town agencies" which were given the sole right to sell liquors for "medicinal, chemical, and mechanical purposes" [Mass. Acts 1852, c. 322, §2]. SITES, CENTRALIZED ADMINISTRATION OF LIQUOR LAWS IN THE AMERICAN COMMONWEALTHS (1899) 102-106. But the town agency system was used only in prohibition states and was not in any sense a substitution for the licensing system, as was the dispensary plan.

The European precursor of the American dispensary system was the so-called Gothenburg system that originated in Gothenburg, Sweden, in 1865. The basis of this system was the elimination of private profit from the sale of liquor by giving to a company of private citizens a monopoly of the liquor trade. The company was to establish retail outlets that were to be strictly supervised and all company profits in excess of six percent on its investment were to be paid over to the town treasury. On the Gothenburg system, see GOULD, POPULAR CONTROL OF THE LIQUOR TRAFFIC (1895).

[88] BLAKEY, THE SALE OF LIQUOR IN THE SOUTH (1912) c. 3. On Nov. 8, 1898, the electorate of the state of South Dakota by a vote of 22,170 votes for and 20,557 against approved the following constitutional amendment:

"Section 1. The manufacture and sale of intoxicating liquors shall be under exclusive state control and shall be conducted by duly authorized agents of the state who shall be paid by salary and not by commissions. . . .

"Section 2. The legislature shall by law prescribe regulations for the enforcement of the provisions of this article and provide suitable and adequate penalties for the violation thereof."

The legislature, however, did not enact enabling legislation, allegedly because of pressure exerted by the Sioux Falls Brewery [ROWNTREE AND SHERWELL, *op. cit. supra* note 57, at 431] and the Supreme Court of South Dakota held in the case of State v. Bradford, 12 S. D. 207, 80 N. W. 143 (1899), that until the legislature prescribed regulations for enforcement of the constitutional provision, the old licensing law remained in effect. At the general election of 1900, the electorate voted 48,673 to 33,927 to repeal the above amendment thus ending the incipient dispensary movement.

[89] S. C. Acts 1892, no. 28, effective July, 1893.

liquor would be sold by the bottle for off-premise consumption; purchasers were to be registered; sales were not to be made in the evenings or to minors, habitual drunkards or intoxicated persons. The administration of the system was to be vested in a Board of Control consisting of the governor, the attorney general, and the comptroller general; later it became a five-man board elected by the legislature.[90] The Board was to appoint dispensary officials and county boards of control which in turn were to appoint local dispensers. The profits of the wholesale dispensary were to be allotted to the school fund and local dispensary profits were to be divided equally between the county and the municipality.

Theoretically such a system was ideal; and there is evidence of its accomplishments. In 1892, before the dispensary law was enacted, there were 613 licensed saloons, while at no time during the history of the dispensary system were there more than 146 dispensaries.[91] Arrests for drunkenness fell off from one third to one half under the dispensary law.[92] Mr. John Koren who investigated the system for the Committee of Fifty[93] concluded that "It is . . . beyond all cavil true that in the cities and towns formerly under license the dispensary law has promoted sobriety and in a truly wonderful degree."[94] Yet in 1907, the commonwealth dispensary system was replaced by a county dispensary system[95] and in 1915, statewide prohibition was adopted.[96] Why the change? Does the experience of South Carolina presage a similar failure for subsequent attempts to remove the private profit element from retail liquor selling?

The South Carolina dispensary system failed (1) because it was administered by corrupt politicians who used the system (a) to strengthen their political machines and (b) to enrich their own private fortunes and (2) because it did not eliminate the private profit motive from retail sales. The dispensary law was originally sponsored by Governor Tillman as a compromise measure that would stave off prohibition and at the same time not alienate the prohibitionist vote which was essential to the maintenance of his political power.[97] Political considerations, so easily discernible in the inception of the dispensary system, also determined the nature of its administration. Politics decided who should be appointed officials and the appointees in turn kept faith by working diligently for the welfare of the party.[98] Besides, those

[90] S. C. Acts 1896, no. 61, §2.

[91] Christensen, *The State Dispensaries of South Carolina* (Nov. 1908) 32 ANNALS 545. These figures do not include the number of illicit sellers that existed under both systems. In 1900, there were 388 persons other than legal dispensers who paid the United States "special tax" imposed on liquor sellers. 11 ENCYC. BRIT. (11th ed. 1911) 768.

[92] WINES AND KOREN, *op. cit. supra* note 35, at 176-178.

[93] The Committee of Fifty which was composed of such eminent men as Charles W. Eliot, President of Harvard, Seth Low, and others sponsored a ten-year survey of the liquor question.

[94] WINES AND KOREN, *op. cit. supra* note 35, at 179.

[95] S. C. Acts 1907, no. 226.

[96] S. C. ACTS 1915, no. 76. Prohibition was voted upon on Sept. 14, 1915, and was approved by a majority of over 24,000 or 71 percent of those voting. CHERRINGTON, THE EVOLUTION OF PROHIBITION IN THE UNITED STATES (1920) 342; COLVIN, PROHIBITION IN THE UNITED STATES (1926) 302.

[97] WINES AND KOREN, *op. cit. supra* note 35, at 141-147.

[98] COLVIN, *op. cit. supra* note 96, at 298-299.

in charge of the dispensary system sold offices, accepted bribes from distillers and others who were interested in selling liquor to the state, and embezzled substantial sums from the system.[99] Finally, the elimination of the personal profit motive which should be a cornerstone of government monopoly control was not achieved by the South Carolina dispensary system. Quite the contrary, the retail dispenser had every reason to stimulate sales, for his salary depended upon the amount of liquor sold.[100] South Carolina's experience is thus an object lesson of the prostitution of government monopoly control. It in no way presages failure for more soundly conceived and better administered monopoly plans.

PROHIBITION CONTROL

National prohibition in the United States did not represent an abrupt break with previous control legislation. On the contrary, it climaxed a long history of temperance reform. During the first three or four decades of the nineteenth century, the primary objective of the temperance movement was to secure individual pledges of personal abstinence.[101] Prohibitory legislation was resorted to only after moral suasion had failed. Prohibitory measures for which the temperance movement was chiefly responsible include high license laws,[102] local option statutes, state prohibition provisions, federal legislation in aid of state prohibitory policies, and the Eighteenth Amendment.[103]

Local Option.

Under local option legislation, local political units are permitted to decide whether licenses to sell liquor should be granted. Maine in 1829, Indiana in 1832, and Georgia in 1833, were apparently the first American commonwealths to experiment with the local option principle.[104] During the next 20 years, a number of states enacted similar legislation and by 1906, there were 30 states with local option laws.[105] A few of the early statutes were held to be invalid on the theory that the legislature had delegated law-making power to the people, but the courts later almost unanimously sustained the laws.[106]

The local option measure that prevailed in most states permitted the electorate of a local political unit to vote that no licenses should be granted; thereafter no licenses

[99] Christensen, *supra* note 91; BLAKEY, *op. cit. supra* note 88, at 19, quoting from the report of the committee appointed to liquidate the state dispensary system: "Some of the 'officials who fattened at the expense of the State became shameless in their abuse of power, insatiable in their greed, and perfidious in their disregard of their oaths of office. . . . We desire to express satisfaction at having reached the end of a business . . . disgusting in revelations of corruption which had so deplorably permeated the business. . . .' "

[100] WINES AND KOREN, *op. cit. supra* note 35, at 168; COLVIN, *op. cit. supra* note 96, at 296.

[101] Warburton, *Prohibition* (1934) 12 ENCYC. SOC. SCIENCES 499, 500.

[102] See *supra* pp. 550-551.

[103] Although these measures were originally sponsored by temperance leaders, they later rejected high license and local option as desirable methods for reaching their objective.

[104] Me. Pub. Acts 1829, c. 133; Ind. Laws 1832, c. 170; Ga. Acts 1833, 125.

[105] Vance, *The Fight for More Anti-Liquor Legislation* (1916) 23 CASE & COM. 38, 43; Warburton, *supra* note 101, at 502.

[106] BLACK, INTOXICATING LIQUORS (1892) §45; Note (1938) 23 IOWA L. REV. 635.

were to be issued until a subsequent election reversed the no-license decision. In Arkansas, however, the statute provided that unless a majority of the votes cast in the county were "For license" no licenses should be granted.[107] Thus the Arkansas system was prohibition with local option for license, rather than license with local option for prohibition, as in most states.[108] Other provisions embodying a local option principle required each applicant for a liquor license to secure the approval of a majority or two thirds of the voters of the political unit within which the saloon was to be located, or provided that the remonstrance of a majority of the voters would prevent the issuance of a license or that no licenses should be issued in the locality if a majority of the voters so petitioned.[109] Local option was accomplished indirectly in some states by the licensing agency's refusal to issue licenses.[110] In others, localities secured local prohibition pursuant to special legislation that permitted the electorate to vote for local prohibition but made no provision for resubmitting the question.[111] The latter cannot strictly be called local option, for the option feature was eliminated after prohibition was voted in.

Legislation governing other local option features was similarly diversified. In some states, the local option unit was the county;[112] in others, the vote was taken by cities, villages, or towns;[113] and in still others, districts within a city could exclude saloons.[114] Some statutes provided that local option elections should be held every one or two years, but in most states, local option elections were held only after a petition of a certain percentage of the voters.[115] No such election was to be held within one, two, three, or four years of a previous local option election, and often it could not be held at the time of any general election.[116] Although the question voted on usually involved only the issue of whether the sale of all intoxicating liquors should be approved or disapproved, a few statutes did permit local option voters to prohibit the sale of distilled liquors and/or lighter intoxicants, or to prohibit sales for on-premise consumption and/or for off-premise consumption.[117]

The chief value of a local option system is that it permits local sentiment to de-

[107] ARK. DIG. STAT. (1884) §4515.

[108] Osborn, *supra* note 26, at 125, 129. The Iowa system was somewhat similar. The state had a prohibition statute; but the mulct law (see *supra* note 35) provided that if the seller paid a "tax" *and*, in cities of 5,000 or more, if "a written statement of consent signed by a majority of voters residing in said city who had voted at the last general election" should be filed with the county auditor, prosecutions for violating the prohibitory law should be barred. IA. CODE (1897) §2448.

[109] *Supra* notes 41, 42; Ill. Laws 1838-1839, 71-72; Ga. Laws 1860, no. 152.

[110] ROWNTREE AND SHERWELL, *op. cit. supra* note 57, at 285-296.

[111] Ga. Acts 1875, no. 263; Md. Laws 1876, c. 79; Miss. Laws 1856, c. 80. Local prohibition was also often secured by special acts of the legislature that prohibited the sale of intoxicants in a particular locality. See Ga. Acts 1875, nos. 117, 281, 332; Md. Laws 1876, c. 313; Miss. Laws 1856, c. 150.

[112] MICH. COMP. LAWS (1897) §5414; MONT. REV. CODE (1907) §2041.

[113] WIS. STAT. (1898) §§1565a-1565c; S. D. REV. CODE (1903) §2856.

[114] OHIO CODE (1910) §§6140-6168; ILL. REV. STAT. (Hurd, 1913) c. 43, §§25-43.

[115] These provisions and the states which enacted them are collected and discussed in Osborn, *supra* note 26, at 128-130; ROWNTREE AND SHERWELL, *op. cit. supra* note 57, c. 4; COLVIN, *op. cit. supra* note 96, c. 20; 4 STANDARD ENCYC. OF THE ALCOHOL PROBLEM (1928) 1586.

[116] *Ibid.*

[117] N. Y. CONSOL. LAWS (1909) c. 34, §13; Vt. Laws 1902, no. 90; CYCLOPEDIA OF TEMPERANCE AND PROHIBITION (1891) 390.

termine the liquor policy of the community; the same public opinion that resolves the question of sale or no sale is responsible for enforcement. But pre-Repeal local option was deficient in three particulars. Because only a comparatively short time was required to elapse between one election and another—generally two years or less—the liquor problem became a recurring political issue that perverted the attention of the electorate from more significant questions.[118] Failure to permit local option voters to discriminate between the various types of intoxicants or between sales for on-premise and those for off-premise consumption unduly canalized public opinion. The general practice of making large and populous political divisions the local option unit was unsatisfactory because those divisions very often contained smaller homogeneous areas which should have been permitted to determine their own liquor policies. A local option measure that has been strengthened by careful draftsmanship to remove these weaknesses[119] can be a valuable adjunct to a control system, for local option rests upon the sound premise that laws, especially sumptuary laws, must express the will of the governed—a premise too often forgotten or disregarded by temperance leaders.

State Prohibition.[120]

Statewide prohibition was first adopted by an American state or territory in 1844 when the territorial legislature of Oregon enacted a general prohibition law.[121] After the Oregon enactment, Maine in 1846 and Delaware in 1847 also adopted prohibition laws;[122] and New Hampshire in 1849 and Michigan in 1850 prohibited the issuance of liquor licenses.[123] During the next five years, these four states strengthened their laws[124] and another ten states enrolled under the prohibition banner.[125] But this first

[118] This evil was of course aggravated in those states where local option elections were held at the time of the general election.

[119] See proposals of FOSDICK AND SCOTT, TOWARD LIQUOR CONTROL (1933) 54, and for post-Repeal practices, see HARRISON AND LAINE, AFTER REPEAL (1936) 72-73.

[120] It should be noted at the outset that the term "prohibition" is really a misnomer, for most laws did not *completely* prohibit the manufacture or sale of intoxicating beverages. In most prohibition states, drug stores or town agencies were permitted to sell intoxicating liquor for medicinal purposes; generally personal manufacture of wine and beer for personal use was not forbidden, and many dry states permitted importation for personal use. See FOSDICK AND SCOTT, *op. cit. supra* note 119, at 22-23.

[121] Ore. Laws 1843-1849, 94, repealed in 1849. CHERRINGTON, *op. cit. supra* note 96, at 126, 133. Earlier United States prohibition measures include: (1) a regulation of the Board of Trustees of the colony of Georgia, enacted in 1733 and repealed in 1742, that prohibited importation and consumption of rum in the colony [3 STANDARD ENCYC. OF THE ALCOHOL PROBLEM (1926) 1077; THOMANN, COLONIAL LIQUOR LAWS (1887) 194-196]; (2) prohibitions against the sale of intoxicating liquors to Indians which were enacted in practically every colony [THOMANN, *passim*]; (3) statutes enacted in several New England states that prohibited the sale of liquor in quantities less than 28 or 15 gallons [Vance, *Growth of Anti-Liquor Legislation* (1916) 23 CASE & COM. 824, 827]; (4) federal statutes prohibiting sales of intoxicating liquor to Indians [4 STAT. 732 (1834); 13 STAT. 29 (1864); United States v. Holliday, 70 U. S. 407 (1865); United States v. 43 Gallons of Whisky, 93 U. S. 188 (1876)].

[122] Me. Acts 1846, c. 205; Del. Laws 1847, c. 184.

[123] N. H. Laws 1849, c. 846; Mich. Const., art. IV, §47.

[124] Me. Acts 1851, c. 211, 1853, c. 48; Del. Laws 1855, c. 255; N. H. Laws 1855, c. 1658; Mich. Laws 1855, no. 17.

[125] Conn. Pub. Acts 1853, c. 57; Ill. Pub. Laws 1851, 18-19; Ind. Laws 1855, c. 105; Iowa Laws 1855, c. 58; Mass. Laws 1852, c. 322; Neb. Laws 1855, 158; N. Y. Laws 1855, c. 231; R. I. Acts 1852, 3; Vt. Laws 1852, no. 24; Pa. Laws 1855, no. 239, repealed before it went into operation. COLVIN, *op. cit. supra* note 96, at 34.

wave of state prohibition was short-lived. Some of the laws were held to be unconstitutional;[126] others were amended to permit the sale of some intoxicants;[127] and still others were completely repealed.[128] Divided public sentiment caused the reaction from this first prohibition crusade. The temperance societies were strong enough to secure a trial for prohibition, but they were not sufficiently powerful to force its retention.[129]

At the beginning of the decade between 1880 and 1890, during which the second great prohibition movement occurred, only three states—Maine, Vermont, and New Hampshire—had a dry status. During that decade five more states adopted prohibition, but one of these, Rhode Island, abandoned it before 1890.[130] During that time, too, the legislatures of nine states either refused to submit the question of prohibition to the electorate, or rejected prohibition proposals, and in 11 other states where the question was submitted to the voters, prohibition was not adopted.[131] During the ten-year period, then, four states had been added to the prohibition list, making a total of seven prohibition commonwealths in 1890 (four of whom deserted the dry ranks by 1903)[132] and 21 states had refused to accept prohibition. The next prohibition wave was, however, much more successful. Engineered by the Anti-Saloon League, it began in 1907 and ended in 1919, during which time 30 states adopted prohibition laws.[133]

Judged by any objective standard, statewide prohibition was not a satisfactory answer to the liquor question. Liquor consumption did not decrease during the period when the statewide prohibition movement was strongest.[134] The records of competent students who carefully observed state prohibition in operation clearly demonstrate that the laws were widely violated, surreptitiously in some localities, openly and notoriously in others.[135] Public officials were corrupted and otherwise law-abiding citizens who opposed what they conceived to be unwarranted interference with their freedom, participated in illegal sales.[136] Official corruption and habitual law violation begot a widespread disrespect for law and order—"too great a price to

[126] O'Daily v. State, 9 Ind. 494 (1857); Beebe v. State, 6 Ind. 501 (1855) Wynehamer v. People, 13 N. Y. 378 (1856).

[127] See Clark, *The History of Liquor Legislation in Iowa* (1908) 6 IOWA J. OF HIST. AND POL. 55, 83-87.

[128] Conn. Pub. Acts 1872, c. 99, §13; Del. Laws 1857, c. 330; Ill. Pub. Laws 1853, 127; Mich. Laws 1875, no. 228; Mass. Laws 1868, c. 141; Neb. Laws 1859, 256; Pa. Laws 1856, no. 233, §35; R. I. Acts 1863, c. 444, §11.

[129] Warburton, *supra* note 101, at 501.

[130] Kansas (1880), Rhode Island (1886), repealed in 1889, Iowa (1884), South Dakota (1889), and North Dakota (1889). See CHERRINGTON, *op. cit. supra* note 96, at 176-184.

[131] *Ibid.*

[132] Iowa Laws 1894, c. 62 (the mulct law that retained prohibition in name but in fact permitted retail sale of intoxicants. See *supra* notes 35, 108; and see Clark, *supra* note 127, at 596 *et seq.*); S. D. Laws 1897, c. 72 (enacted after constitutional prohibition had been repealed in 1896); Vt. Laws 1902, No. 90; N. H. Laws 1903, c. 95.

[133] For an interesting account of the Anti-Saloon League, see ODEGARD, PRESSURE POLITICS (1928). The thirty states and the dates they adopted prohibition are listed in Warburton, *supra* note 101, at 502, and in COLVIN, *op. cit. supra* note 96, at 435.

[134] Warburton, *supra* note 101, at 503.

[135] WINES AND KOREN, *op. cit. supra* note 35; FANSHAWE, *op. cit. supra* note 33; ROWNTREE AND SHERWELL, *op. cit. supra* note 57.

[136] *Ibid.*

pay for whatever gains may [have been] secured."[137] These evils were the inevitable result of divided public sentiment; prohibition, which interferes so drastically with deeply rooted habits and customs, cannot be successful unless there is an overwhelming public support behind it. This bitter lesson was well learned during national prohibition; it is unfortunate that the United States did not heed the failure of state prohibition and thus avoid the painful experience of the "noble experiment."

Federal Legislation in Aid of State Prohibitory Laws.

The need for legislation of this type was convincingly demonstrated by two Supreme Court cases involving prohibition laws. In the first, an Iowa statute which prohibited the transportation of intoxicating liquor into Iowa by a carrier unless the shipper furnished a certificate that the consignee was authorized to sell liquor was held invalid because it conflicted with Congressional "intention" that the transportation of commodities between states shall be free.[138] The second decision applied the original package doctrine to deny the right of the state to prohibit the sale of intoxicating liquors in their original packages.[139] State prohibition laws were thus largely nullified, for liquor dealers could and did sell intoxicants in their original packages and the states were powerless to interfere.[140]

Legislation to remedy this situation was sought from Congress which promptly passed the Wilson Act.[141] This law provided that liquors upon "arrival" in a state should be "subject to the operation and effect of the laws of such State . . . in the same manner as though such . . . liquors had been produced in such State. . . ." The statute was held to be constitutional,[142] but the word "arrival" was construed to mean delivery to the consignee and not a mere arrival within the boundaries of the state.[143] Thus until the goods were delivered to the consignee they were in interstate commerce and the states had no power to interfere with the free flow of that commerce.[144] Accordingly, while a drinker could not legally purchase from a state liquor vendor, it was perfectly permissible for him to order from out-of-state dealers. The Wilson Act made it more inconvenient to secure liquor, but that was all.

Again there was a request for Congressional aid, resulting in the passage of the Webb-Kenyon Act which prohibited the shipment of liquor into a state in violation

[137] FOSDICK AND SCOTT, *supra* note 119, at 25.

[138] Bowman v. Chicago & N. W. R. R., 125 U. S. 495 (1888).

[139] Leisy v. Hardin, 135 U. S. 100 (1890). *Cf.* License Cases, 5 How. 504 (1847).

[140] Dowling and Hubbard, *Divesting an Article of its Interstate Character* (1920) 5 MINN. L. REV. 100, 104.

[141] 26 STAT. 313 (1890).

[142] *In re* Rahrer, 140 U. S. 545 (1891).

[143] Rhodes v. Iowa, 170 U. S. 412 (1898).

[144] Subsequent Supreme Court decisions further emasculated the Wilson Act: Vance v. Vandercock, 170 U. S. 438 (1898) (a state cannot compel a resident-consignee to certify to a state official the quantity and kind of liquor to be imported; nor can it require the nonresident-consignor to attach a certificate to the package); Heyman v. Southern R. R., 203 U. S. 270 (1906) (a state's power over imported liquor does not attach before the expiration of a reasonable time); Adams Express Co. v. Kentucky, 206 U. S. 129 (1907) (a state cannot prohibit C. O. D. shipments of liquor). The decisions in all these cases rested on a "construction" of the Wilson Act and the inability of a state unreasonably to interfere with interstate commerce.

of its laws.[145] Violation of the Act was not made a federal offense; the legislation merely divested intoxicating liquors of their interstate character, thereby subjecting all shipments to state control as soon as they reached the state line. This statute thus accomplished the prohibitionist objective of removing the protection of the commerce clause from shipments of alcoholic beverages into a state in violation of its laws.[146]

But despite this legislation and other laws passed by Congress to aid dry states,[147] the prohibitionists continued to press for more drastic federal liquor legislation. In 1917, their efforts resulted in the passage of the Reed Amendment.[148] This law provided that "whoever shall order, purchase or cause intoxicating liquors to be transported in interstate commerce" into any state the laws of which prohibit the manufacture or sale of intoxicating liquors should be fined and/or imprisoned.[149] By its terms, the Reed Amendment was applicable even though the state permitted liquors to be imported for personal use. Thus the Amendment imposed a "bone-dry" policy concerning interstate shipments of intoxicating liquors upon any state that prohibited the manufacture or sale of intoxicants.[149a] National prohibition was one step nearer to realization.

National Prohibition.

Shortly after the entry of the United States into World War I, Congress prohibited the sale of liquor at any military station or enlisted men's club or to any member of the military forces while in uniform and gave the President power to prohibit the sale of alcoholic liquors in or near military camps and to members of the army.[150] Congress then passed the Food Control Act of August, 1917, which prohibited the use of food materials or feeds in the production of distilled spirits for beverage pur-

[145] "The shipment or transportation . . . of any . . . liquor of any kind, from one State . . . into any other State, . . . which . . . liquor is intended . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." 37 STAT. 699 (1913).

[146] Clark Distilling Co. v. Western Maryland R. R., 242 U. S. 311 (1916); Seaboard Air Line R. R. v. North Carolina, 245 U. S. 298 (1917).

[147] Four provisions enacted by Congress in 1909 aided the dry cause: (1) intoxicating liquors were declared to be nonmailable; (2) express companies and other common carriers were not to deliver intoxicants to fictitious consignees; (3) they were not to deliver C. O. D. liquor packages; and (4) all packages containing liquors were to be so labeled as "to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein." 35 STAT. 1131, 1136-37.

[148] 39 STAT. 1069 (1917), amended by 39 STAT. 1202 (1917), 40 STAT. 329 (1917), 40 STAT. 1151 (1919), 41 STAT. 313 (1919), 48 STAT. 316 (1934). Held constitutional in United States v. Hill, 248 U. S. 420 (1919). Repealed by 49 STAT. 1930 (1936). See Graves, *The Reed "Bone-Dry" Amendment* (1917) 4 VA. L. REV. 634; Russell, *The States Did Not Fail in Liquor Control* (1933) 23 KY. L. J. 427.

[149] It also provided that no advertisement of, or order for, intoxicating liquors should be desposited in, or carried by, the mails when addressed to any person in a state, the laws of which made it unlawful to advertise or solicit orders for such liquors; and provided for certain penalties if a publisher or dealer in liquors should "knowingly" violate the provisions of this part of the Amendment.

[149a] See United States v. Collins, 254 Fed. 869 (W. D. La. 1919); Rockwell, *Federal Legislation After Repeal* (1933) 37 LAW NOTES 84, 86; Cushman, *The National Police Power Under the Commerce Clause of the Constitution* (1919) 3 MINN. L. REV. 381, 409.

[150] 37 STAT. 82 (1917), amended by 40 STAT. 393 (1917). See President's Proclamation of June 27, 1918; Evans v. United States, 261 Fed. 103 (C. C. A. 2d, 1919) (as to the extent of the prohibited zone); United States v. Kinsel, 263 Fed. 141 (N. D. Wash., 1918) (as to liquors prohibited).

poses[151] and the War Prohibition Act of November, 1918, which provided that after June 30, 1919, until the termination of demobilization it should be illegal to sell intoxicating liquors.[152] Finally, the adoption of the Eighteenth Amendment in January, 1919, made the federal policy of national prohibition supreme.

Many factors help to explain the adoption of the Amendment. Public opinion was profoundly disturbed by the evils of the saloon (which were aggravated by the tied-house system[153]) and the corrupt alliance between liquor and politics. In addition to these two major causes, there was the argument that by enforcing prohibition the productivity of the nation would be enlarged, because workers would be more efficient and the money theretofore spent for liquor would be invested in more productive enterprises.[154] Business interests, convinced that sober employees would result from the adoption of national prohibition, supported the dry crusade.[155] It was also urged that wages would be increased and that standards of living would be raised. Closely akin to the economic argument was the appeal to patriotism: that if the Amendment were adopted, the grain, labor and capital theretofore used in the brewing and distilling industries would be directed toward helping America win the war.[156]

All these factors were skillfully exploited by the driving force against liquor, the Anti-Saloon League. Congress acquiesced;[157] so did a sufficient number of states.[158] The result was the Eighteenth Amendment to the Constitution which prohibited the manufacture, sale or transportation of intoxicating liquors. The unfortunate results of this attempt at legal coercion are well known. The saloon was replaced by the speakeasy which served adults and minors with impartiality. Instead of being able to secure liquor made by an experienced distiller with a national or local reputation, the average consumer was forced to accept "bath tub" gin, or alcohol that had been "cut," colored, and flavored to resemble whisky. Bootleggers did a thriving business,

[151] 40 STAT. 276 (1917).

[152] 40 STAT. 1045 (1918), construed and held valid in Hamilton v. Kentucky Distilleries Co., 251 U. S. 146 (1919). *Cf.* United States v. Standard Brewery, Inc., 251 U. S. 210 (1920). See also Ehrlich, *War-Time Prohibition* (1919) 8 CALIF. L. REV. 44.

[153] See *supra* pp. 555-556.

[154] But see WARBURTON, THE ECONOMIC RESULTS OF PROHIBITION (1932) 26, concluding that "prohibition has not been a fact of measurable significance in the increased industrial productivity of recent years."

[155] "The Rockefellers, S. S. Kresge, James N. Gamble, John Wanamaker, Joseph Boyer of the Burroughs Adding Machine Company, James Horton Ice Cream Company, J. L. Hudson of the Hudson Motor Company, R. E. Olds of the Reo Motor Company, S. S. Martin of the National Biscuit Company, the United States Steel Corporation—all donated freely." And Henry Ford said, "The Eighteenth Amendment is recognized by the men and women of our country, the women especially, as the greatest force for the comfort and prosperity of the United States." Hacker, *The Rise and Fall of Prohibition* (1932) 36 CURR. HIST. 662, 670.

[156] In addition there was the emotional appeal that "German brewers in this country have rendered thousands of men inefficient and are thus crippling the Republic in its fight on Prussian militarism." Quoted by Hacker, *supra* note 155, at 665. Thus the fight for prohibition was coalesced with the fight against Germany.

[157] The Joint Resolution of Dec. 18, 1917, 40 STAT. 1050, proposed an Amendment to the Constitution which later became the Eighteenth.

[158] On Jan. 29, 1919, the Secretary of State proclaimed that on or before Jan. 16, the necessary 36 states had ratified the Amendment.

charged high prices, paid their taxes in the form of protection money, and corrupted local, state, and national officials.[159] Thus the unholy alliance between liquor and politics, one of the causes of Prohibition, returned in an aggravated form. With political protection assured, the bootlegging element branched out into other criminal activities, particularly into the fields of racketeering and gambling.

Law enforcement agencies failed to cope with the problem successfully.[160] Many factors explain this failure. Congress refused to establish an adequate enforcement agency. It voted dry, but apparently was quite wet when it came to giving the Prohibition Bureau adequate appropriations.[161] Even with decent appropriations, it would have been well-nigh impossible for the Federal Government to police the liquor activities of its citizenry. There is a limit to effective federal action. This weakness might possibly have been remedied by state assistance, but the states refused to cooperate with the Federal Government in its attempt to enforce the law.[162] In no one year did the combined enforcement appropriations of the states equal one million dollars.[163] Courts, bogged down with a flood of liquor prosecutions, held "bargain days" on which alleged violators could plead guilty and be assured of a light fine or suspended sentence.[164]

The most important reason for the failure in enforcement is found in the attitude of the public. Indeed, this attitude probably explains why state and federal governments failed to establish adequate enforcement agencies. People resented being ordered by a Constitutional command not to indulge in even a glass of mildly euphoric beer.[165] They objected to the disregard of the law by the wealthy who were able and willing to pay high prices in order to keep a well-stocked cellar. Law enforcement officials often used crude methods that stirred up opposition to them and the law they represented.[166] All this resulted in public apathy or opposition to national prohibition and made effective enforcement practically impossible. With the breakdown in law enforcement and the widespread violation of the laws that had been enacted pursuant to the power granted in the Amendment, there arose a general disregard for law and order. It is precisely here that Prohibition caused the most havoc, for law and order, respect for authority, are basic to the well-being of any government. The effort to eradicate the acknowledged evils of the pre-Prohibition era resulted in the greater evil of disrespect for and violation of law.[167]

[159] Nat. Comm. on Law Obs. and Enf., *op. cit. supra* note 82, at 44.

[160] *Id.*, 22 *et seq.*

[161] Hacker, *supra* note 155, at 666.

[162] Maryland's attitude is illustrative: "In Maryland we decline to make the Volstead Act a law of the state. . . . We simply say it is a federal law and not Maryland law, and it is no part of our duty as a State to adopt it as our own and set up State machinery to carry it out. We leave its enforcement in our State to the federal government which made it." Address by Gov. Albert Ritchie, *Enforcement of the Eighteenth Amendment and the Volstead Act*, Aug. 14, 1929, quoted in Note (1938) 23 IOWA L. REV. 635, 645 n. 68.

[163] Hacker, *supra* note 155, at 669.

[164] Stevenson, *Fallacies of Volsteadism* (1926) 25 LAW NOTES 211.

[165] NATIONAL PROHIBITION ACT, 41 STAT. 305 (1919) tit. II, §29, made all beverages containing one half of one percent or more of alcohol by volume "intoxicating liquors."

[166] Nat. Comm. on Law Obs. and Enf., *op. cit. supra* note 82, at 55 *et seq.* The material in this paragraph is based upon that source.

[167] Henry W. Anderson, a member of the so-called Wickersham Commission, (*id.* at 90) listed the

Such a situation could not long endure. Individuals not associated with the liquor interests organized and headed associations against the continuance of national prohibition.[168] Prominent leaders who had theretofore been noncommittal or active supporters of the Amendment publicly announced their opposition.[169] A Literary Digest poll in 1930 indicated that the Amendment was very unpopular.[170] However, many felt that the prosperity of the twenties was caused in part at least by Prohibition, and Anti-Saloon League spokesmen played this theme at every opportunity.[171] But this prop was removed by the depression of the thirties. The wets, missing no chances, publicized the theory that legalizing the liquor traffic would provide the necessary impetus for economic recovery. Federal and state governments, their budgets unbalanced by relief expenditures and decreased tax returns, looked anxiously for new sources of revenue. Eventually these forces became sufficiently strong, and on December 5, 1933, Utah, the thirty-sixth state, ratified the Twenty-first Amendment:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.

AT REPEAL

With the adoption of the Twenty-first Amendment, the states again became the primary instruments of alcoholic beverage control, free to experiment with new control systems or to return to pre-Prohibition plans. The Federal Government was to coop-

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evils which he found resulted from the attempt to make "the entire population of the United States total abstainers in disregard of the demand deeply rooted in the habits and customs of the people." He stated in his separate statement:

"As a result [of Prohibition] we are confronted by new evils of far-reaching and disturbing consequence. . . . The fruitless efforts at enforcement are creating public disregard not only for this law but for all laws. Public corruption through the purchase of official protection for this illegal traffic is widespread and notorious. The courts are cluttered with prohibition cases to an extent which seriously affects the entire administration of justice. The prisons . . . are overflowing. . . . The people are being poisoned with bad and unregulated liquor. . . . The illicit producer, the bootlegger and the speakeasy are reaping a rich harvest of profits. . . . The enormous revenues (estimated at from two to three billion dollars per annum) placed in the hands of the lawless and criminal elements of society through this illegal traffic are not only enabling them to carry on this business, but to organize and develop other lines of criminal activity to an extent which threatens social and economic security."

[168] Pierre S. Du Pont headed the Association Against Prohibition; Mrs. Charles S. Sabin, the Women's Organization for National Prohibition Reform.

[169] "John D. Rockefeller, Jr., regarded as the most prominent individual in the ranks of prohibition supporters, one of the largest contributors to the Anti-Saloon League, and who with his father subscribed $350,000 to make possible the adoption of prohibition legislation, declared himself yesterday in favor of repeal of the Eighteenth Amendment." Two days later Dr. John R. Mott, president of the Y. M. C. A. declared himself in favor of resubmission of the question to the voters. N. Y. Times, June 7 and 9, 1932, p. 1.

[170] 20,000,000 ballots were distributed; over 4,000,000 were voted, 73.9 percent of which opposed the Amendment.

[171] This Anti-Saloon League declaration is illustrative: "Industry, commerce, art, literature, music, learning, entertainment, and benevolence find their finest expressions in this saloonless land." Quoted by Hacker, *supra* note 155, at 670.

erate to the extent of protecting dry states from interstate or foreign importations and regulating those phases of the traffic that could not effectively be controlled by the states.[172] Within this framework legislators were to evolve regulatory systems that would avoid the errors of Prohibition and pre-Prohibition eras and thus contribute a reasonably permanent solution to the problem which over two centuries of legislation had failed to solve satisfactorily.

The first objective of post-Repeal liquor legislation should have been to abolish lawlessness and restore respect for law and order.[173] The widespread disrespect for the Prohibition Amendment and its implementing laws proved again that there is a limit to effective legal action and that law must bear a reasonably close relation to the *mores* of the community. Post-Repeal control systems then should have been based upon the habits, customs, and desires of the persons regulated. Local option, provision for personal importation in dry states, and an intelligent educational program are all desirable expedients. Also, because the bootlegger was so strongly entrenched at the time of Repeal, governments should have made inexpensive legal liquor so easily obtainable that the illegal seller could not compete, thereby destroying his insidious power. This could have been done by imposing low fees and taxes during the first years after Repeal. Social and not revenue considerations should determine liquor-taxing policies.[174]

The second important aim should have been to encourage temperance and moderation in the consumption of alcoholic beverages. This could best, and perhaps only, be accomplished through a long-range process of education. But education is a slow procedure and there were supplementary devices that could have been utilized immediately. Chief among these was the state monopoly plan under which the state would be the sole retailer of intoxicating beverages. Liquors would be fairly easily obtained by those who wished to drink, but the motive of private profit in retail sales having been eliminated, there would be no stimulation of sales. Certainly this plan offered the most hope for avoiding pre-Prohibition abuses and it was the one recommended by the Rockefeller committee.[175] But if a state rejected the monopoly plan, temperance and moderation could still have been fostered by subjecting the sale of light wines and beers to little restraint and by so taxing those liquors as to make them

[172] The 1932 platforms of both major parties contained planks urging protection for dry states. The same thought was expressed in Congress during the debate on the way in which an amendment should be phrased. 70 CONG. REC. 1070 *et seq.* (1933). See also the testimony of Mr. Joseph H. Choate, Jr., before the Ways and Means Committee, "Now of course, another tremendous part of the obligation of the government is to do what has to be done in order to enforce the twenty-first amendment itself." Mr. Choate who was Administrator of the Federal Alcohol Control Administration, also stated that the United States should "do for those states and for the people at large those things which no single state could do." *Hearings before Committee on Ways and Means on H. R. 8539*, 74th Cong., 1st Sess. (1935) 9-10.

[173] FOSDICK AND SCOTT, TOWARD LIQUOR CONTROL (1933) 15. This work was the result of a thorough study of the liquor problem undertaken by Messrs. Fosdick and Scott at the request of Mr. John D. Rockefeller, Jr. The authors were aided by a large research staff, among them, Mr. Leonard V. Harrison and Miss Elizabeth Laine who later wrote the book, *After Repeal*. *Toward Liquor Control* has been an invaluable aid in the preparation of this paper and it is a pleasure to acknowledge here my indebtedness.

[174] *Cf.* Studenski, *The Taxation of Liquor* (1936) 14 TAX MAG. 8.

[175] *Supra* note 173.

comparatively inexpensive. The latter could have been accomplished by the application of Professor Yandell Henderson's "principle of dilution." According to this theory, liquor taxes should be levied upon the alcohol contained in the beverage and the alcohol in diluted beverages (in which the percentage of alcohol is relatively small) should be taxed at a much lower rate than the alcohol in concentrated beverages.[176] Temperance might also have been furthered by limiting sales for on-premise consumption to *bona fide* restaurants and by requiring that drinks only be sold with meals.[177] However the obvious difficulty of enforcing the latter requirement strongly suggests that it not be adopted. Lastly, the temperance cause should have been advanced by subjecting alcoholic beverage advertising to rigorous control.

Third, the old saloon could not be permitted to return. Legislation against the tied-house in any of its forms was in order, and the location and character of establishments where liquor was to be sold should have been strictly regulated. The old pre-Prohibition regulations concerning the number of outlets, their location, persons to whom liquor could not be served, hours and days of sale, sales on credit, and similar restrictions might profitably have been supplemented by requirements designed to improve the appearance of places where liquor was to be sold.

Fourth, the consumer interest in being protected from deception and in securing a pure product at the lowest possible price pressed for recognition. Labeling and advertising practices as well as manufacturing processes and oligopolistic tendencies required supervision and regulation; and suitable legislation to meet these needs should have been enacted. These functions might have been allocated to existing agencies such as the Food and Drugs Administration, the Federal Trade Commission, the Bureau of Internal Revenue, and the Anti-Trust Division of the Department of Justice, but that would involve a division of responsibility and often result in a duplication of investigatory and enforcement procedures, expensive to both the industry and government.[178] Avoidance of these consequences would seem sufficient reason for establishing a single administrative agency to regulate all phases of the liquor traffic.

It should also be noted that at the time of Repeal, the liquor industry was a new business. Governments did not have to worry about shifting existing patterns or interfering with allegedly "vested" interests. Transitional difficulties which so often thwart a program of social reform were absent or negligible. It is much easier to *prevent* oligopoly than it is to atomize huge industrial units *after* oligopoly has become entrenched. The very fact that the liquor industry had a record of price fixing and restriction of production by agreement should have induced governments to act quickly and firmly against the danger of monopolistic practices.

Fifth, so far as possible the liquor question should have been eliminated as a

[176] HENDERSON, A NEW DEAL IN LIQUOR (1934).

[177] See Sheppard, *After Five Years, What Has Repeal Achieved?*, N. Y. Times Mag., Dec. 4, 1938, p. 5.

[178] Handler, *The Control of False Advertising Under the Wheeler-Lea Act* (1939) 6 LAW AND CONTEMP. PROB. 91, 108.

political issue and the corruptive political influence of the liquor interests should have been forestalled. These objectives could have been most easily achieved by establishing a central administrative agency, delegating to it adequate powers, staffing it with capable personnel, freeing it from political pressures, and supplying it with ample funds. This would have removed the liquor question from the legislative and public forum where it had too long been the center of attention and placed it in the hands of an expert administrative tribunal, free to devote its time and energies to liquor control. It would also have prevented in large measure a recurrence of the insidious political influence exerted by the liquor trade, particularly if the administrative body were a state agency and therefore free to disregard the pressures of local political leaders. Also, cooperation concerning liquor regulation between the various states and the Federal Government would be facilitated by vesting the administration of control legislation in administrative tribunals.

Finally, because any permanent liquor reform must involve a program of public education, which presupposes the existence of a body of information worthy of communicating to the public, and because sound liquor legislation presupposes an informed law-making body, there should have been established some agency or agencies to engage in a program of research for ascertaining the facts concerning liquor and liquor control. Inasmuch as most private agencies would be subject to the charge of bias and probably would not carry on a sustained program of research, the task devolved upon government.

Legislation embodying these suggestions would have represented real and significant progress in the field of alcoholic beverage control. But the liquor problem cannot be solved by a statute, however wisely designed and however soundly administered. Goodness cannot be legislated into men. Temperance, moderation, self-control—these must be the bases of any lasting reform.

FEDERAL ACTIVITY IN ALCOHOLIC BEVERAGE CONTROL

John E. O'Neill*

The alcoholic beverage industry, often referred to since repeal of the Eighteenth Amendment as "new born," was never a babe in swaddling clothes even at the moment of its inception. As it nears the age of seven, it towers in size over many of its older brothers who have long since reached maturity. Over 1,229,000 persons, including proprietors and employees, derive their livelihood directly from the manufacture and sale of alcoholic beverages.[1] There are operating in the United States approximately 280 distilleries, 600 breweries, 1,100 wineries, 250 rectifying plants, 14,000 wholesalers and 309,000 retail liquor establishments.

In an average year approximately three billion dollars is expended by the American consumer in purchasing distilled spirits, wines and malt beverages, one billion dollars of which goes to the federal, state and local governments in the form of miscellaneous taxes and licensing fees, one billion dollars into wages and salaries, and the remainder into raw materials, transportation, fuel, barrels, bottles, printing, advertising, and similar basic production costs, and into operating profits.[2] The annual domestic consumption of alcoholic beverages, as indicated by federal tax payments, approximates 90 million gallons of distilled spirits, 71 million gallons of wine, and 52 million barrels of beer.

Federal receipts in internal revenue taxes and customs duties on alcoholic beverages amounted to $635,786,935.20 in 1939, out of a total federal, state and local revenue from these products of $1,010,384,672.86.[3] The industry ranked third among all industries in the total amount spent on newspaper advertising during 1939, and sixth in expenditures for advertising in the four media of newspapers, magazines, farm journals and chain radio. The 1939 advertising expenditure of the industry in these media exceeded 29 million dollars, and was surpassed only by expenditures for advertising of groceries, automobiles, toilet requisites, tobacco, and medical supplies.[4]

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[1] Distilled Spirits Institute Release, April 25, 1940.

[2] *Id., Economic Statistics of the Distilling Industry* (1940).

[3] *Id., Public Revenues from Alcoholic Beverages 1939* (1940).

[4] Bureau of Adv'g of the Am. Newspaper Publishers Ass'n Rep., July, 1940.

Including outdoor advertising, pamphlets, and point of sale advertising matter upon which is being expended annually an additional 13 million dollars the total annual advertising bill for alcoholic beverages is 42 million dollars.

The liquor industry is the most thoroughly regulated and carefully supervised of all industries. As time passes new ideas for making the control and supervision even more effective are being translated into federal, state and local laws and regulations. Seldom has there been any tendency to relax a control over the industry once acquired. The necessity for rigid control, from the revenue as well as the social standpoint, is indicated by the fact that the lawless element, from the time the first liquor tax was imposed, has competed with the legitimate industry for the consumers trade, with liquor of illicit production. This tendency on the part of persons not inclined to law observance, to compete with legitimate industry, has not been so noticeable where excise taxes are imposed on other commodities such as gasoline and tobacco, even though the tax rate, in proportion to the retail cost of the product, exceeds the tax rate on liquor. This is no doubt due to many considerations, including the ready availability of materials from which liquor can be produced, the relative simplicity of the process of manufacture, in which nature plays a large part, the comparatively high cost of the finished product, and the very nature of the product itself, as an intoxicant. The scope of illicit liquor operations is indicated by the fact that about 12,000 moonshine stills are seized and destroyed each year.[5] During the fiscal year ended June 30, 1940, 18,056 persons were convicted of liquor law violations. In the fiscal year 1939, 42 percent of all federal prisoners committed to the penitentiary were liquor law violators.[6] The protection of the legitimate industry from bootleg competition is essential from the revenue as well as the social point of view, and in consequence constitutes a large part of the federal picture of liquor control.

POST-REPEAL INNOVATIONS IN LIQUOR CONTROL

Establishment of the Federal Alcohol Control Administration

The liquor problem was one of the first dealt with by Congress following the 1932 elections. Senate Joint Resolution 211, proposing the Twenty-first Amendment to the Constitution, was passed by the Senate February 16, 1933, and by the House of Representatives on February 20, 1933. Within ten months, on December 5, 1933, upon the ratification of the amendment by the State of Utah, Repeal became an accomplished fact. In his repeal proclamation the President stated in part:[7] "The policy of the Government will be to see to it that the social and political evils that have existed in the pre-prohibition era shall not be revived nor permitted again to exist. We must remove forever from our midst the menace of the bootlegger and such others as would profit at the expense of good government, law, and order."

The assumption by the Federal Government of some of the responsibility for

[5] *Hearings before Subcommittee of the House Committee on Appropriations on Treasury Dep't Appropriation Bill for 1941*, 76th Cong. 3d Sess. (1940) 310 (testimony of Deputy Commissioner of Internal Revenue, Stewart Berkshire).

[6] *Id.* at 305.

[7] 48 STAT. 1721 (1933).

eliminating the "social and political evils" surrounding the liquor traffic paved the way to the adoption of new and novel federal regulations. Prior to Prohibition, federal liquor legislation was designed primarily for the protection of the revenue. Taxes were levied on the various occupations connected with the production and distribution of alcoholic beverages, and excise taxes were imposed upon the beverages produced. In consequence, the executive branch of the government, in the liquor field, devoted itself almost exclusively to the collection of the revenue and the apprehension and punishment of tax evaders.

As Congress was not in session at the time of Repeal, the code system established under the National Industrial Recovery Act,[8] was viewed as a ready instrument to effectuate the new policy, until such time as Congress might enact specific legislation. Codes of fair competition were adopted for all branches of the industry, except retailers, and the Federal Alcohol Control Administration was created by executive order on December 4, 1933, to administer these codes.[9] The various industries were organized into associations, and were represented by elected Code Authorities, which were vested with considerable authority to investigate and report code violations. The Federal Alcohol Control Administration applied the sanctions prescribed by these codes. The main purposes of the six alcoholic beverage codes were:

1. Protection of the consumer against deception from false and misleading labeling and advertising, and providing the consumer with adequate information as to the identity and characteristics of the product.
2. Prevention of unfair trade practices, such as commercial bribery, consignment and conditional sales, the control of retail outlets, furnishing of advertising, display or distribution service to trade buyers, guarantees against price decline, and furnishing of prizes, premiums, or gifts to trade or consumer buyers.
3. Prevention of shipments of intoxicating liquor into any state for delivery or use therein in violation of state law.
4. Prevention of sales of distilled spirits in bulk containers into wholesale, retail and consumer channels.
5. Limitation of production and importation of alcoholic beverages to the quantities necessary to meet consumer demands.
6. Price control, by establishing open price posting, preventing sales at prices not posted, and declaring ineffective posted prices which were oppressively high or destructively low.

Although the Federal Alcoholic Control Administration ceased to function on May 27, 1935, when the National Industrial Recovery Act was declared unconstitutional by the Supreme Court in the *Schechter* case,[10] most of the practices outlined above were made unlawful by the passage in August, 1935, of the Federal Alcohol Administration Act[11] which created a new division in the Treasury Department to be known as the Federal Alcohol Administration. Congress eliminated from the Federal Alcohol Administration Act all provisions formerly contained in the liquor codes dealing with price maintenance, limitation of production, and allocation of

[8] 48 STAT. 195 (1933).
[9] Exec. Order 6474.
[10] Schechter Bros. Poultry Corp. v. U. S., 295 U. S. 495 (1935).
[11] 49 STAT. 977 (1935), 27 U. S. C. §§201 *et seq.* The Act is referred to several times in this paper, but will not be hereafter cited in the footnotes.

importations. A brief description of the experiments made in the early days of Repeal in the limitation of distilled spirits production, and in the curtailment of importations, would seem in order at this point.

Experiments in Limiting the Volume of Distilled Spirits Produced and Imported

The original Code of Fair Competition for the Distilling Industry, approved by the President on November 26, 1933,[12] provided for the issuance of distillers permits to cover only existing plants, or plants under construction at the time of Repeal, except, after hearing, on a finding that new plant capacity was necessary to meet present or potential consumptive demands. Distilling permits, containing definite limitations upon the plant facilities which might be employed and the quantities which might be produced in a 24-hour period, were issued promptly on and after December 5, 1933, to proprietors of existing plants and to persons engaged in building them. Distilling plants in existence at the time of Repeal and in process of construction, covering which code permits were issued, had an authorized theoretical capacity of over 270 million gallons of whisky, gin, brandy, and rum per year.[13] Nevertheless applications for permits came in large numbers from persons desiring to commence the construction of new distilleries and approximately 100 such applications were denied up to September, 1934, consistent with the policy of discouraging additional plant capacity. During this period considerable criticism was leveled at the Federal Alcohol Control Administration for allegedly fostering monopoly by refusing to allow new distilling enterprises to go into competition with vested interests. In March, 1935, a public hearing was conducted in Washington on a proposal to amend the distillers' code by eliminating therefrom restrictions upon the issuance of permits on a basis of existing plant capacity, and to open the way to issuing such permits to all applicants who could qualify on the basis of experience, trade connections and financial standing as potential legal producers. Following this public hearing the distillers' code was so amended on April 5, 1935, and thereafter all efforts on the part of the government to curtail or limit production were abandoned.

In announcing the adoption of the new policy the Federal Alcohol Control Administration stated:[14]

"these provisions had been incorporated into the Code as originally written in order to keep out of the industry in its early stages an anticipated swarm of speculators, seeking quick easy profits in the distilling business. The waste of capital investment and the demoralization of the existing industry through excessive competition, necessarily resulting from the inclusion of such unstable elements into a new industry, was largely prevented by these provisions. A year's experience now demonstrates to the prospective investor that ability and experience are as necessary in the distillery business as in other types of business, and that the opportunity for easy financing of, and large and quick returns on, distillery investments is exceedingly limited.

"Since an undue increase in the size of the industry is no longer to be expected, the original Code provisions have to some extent outlived their usefulness and it is felt that

[12] Exec. Order No. 6444-A.

[13] FACA Release, Apr. 29, 1934.

[14] FACA Release 196, Apr. 8, 1935.

the burdens they place upon prospective industry members are no longer justified. They have operated unfairly by preventing citizens of states which have but recently become wet from entering the industry and have unduly hindered the successful small operator from enlarging his plant to take advantage of increases in his market."

The original code of the rectifying industry, approved by the President September 9, 1933,[15] provided that applicants for permits must prove to the satisfaction of the Administration that their products could be absorbed "by the probable market demand." As early as May, 1934, the issuance of permits to rectifiers was rigidly curtailed and during 1934 and early 1935 scores of applications for such permits were denied because of the applicant's inability to show that his products could be absorbed by the probable market demand. Severe criticism of this policy from many quarters led to the amendment of the rectifiers' code in April, 1935,[16] so as to provide thereafter for the issuance of such permits independent of any showing of a market demand.

Immediately following Repeal an effort was also made, under the Agricultural Adjustment Act,[17] to limit the quantities of alcoholic beverages imported into the United States and to allocate the same among the domestic importers. The marketing agreement for the alcoholic beverages importing industry[18] provided in Article III, Section 2: "From time to time the Secretary of Agriculture and the Secretary of the Treasury shall jointly determine and report to the issuing authority the kinds and amounts of alcoholic beverages permitted to be imported into the United States from each foreign country."

The determinations so made were predicated in part upon the quantities of American agricultural products which representatives of foreign governments agreed to purchase in return for wine and spirit orders. During the first three months following Repeal, authorizations were issued to import 12,837,244 gallons of alcoholic beverages of all types.[19] Immediately after these allotments had been made, over 1,200 persons filed applications to import an additional 50 million gallons of alcoholic beverages of all types.[20] However, permits for a second import period were issued to only about 700 applicants authorizing the importation of approximately eight million gallons of alcoholic beverages of all types.[21] Dissatisfaction with the allotment system was early made evident, and in view of the obvious impossibility of making an equitable and completely satisfactory allocation of quotas to individual importers, the attempt to limit importations was virtually abandoned early in March, 1934. The government has never undertaken to limit or allocate the domestic production of wine or malt beverages.

The Basic Permit System

Under federal laws in existence before Prohibition and at the time of Repeal there was no means of keeping the criminal element from entering the legalized

[15] Exec. Order No. 6487-B.
[16] Exec. Order No. 7022.
[17] 48 STAT. 31 (1934).
[18] Agreement 25 (Dec. 1, 1933).
[19] FACA Release 32, Feb. 1, 1934.
[20] *Id.* 36, Feb. 9, 1934.
[21] *Id.* 41, March 1, 1934.

beverage liquor field. The executive branch of government, except to a limited extent in the case of distilleries,[22] was powerless to prevent potential law violators and even convicted criminals from entering into the business of producing or distributing alcoholic beverages. Under this system, where violations of the revenue laws occurred upon legalized premises, or where the proprietors of registered plants committed criminal acts outside of the legalized premises, it was possible for the business to be continued upon the criminal's behalf by others while he served a jail term upon conviction, or by himself in cases where conviction resulted in the imposition of a fine.

At the very outset of Repeal a permit system was introduced into all of the alcoholic beverage industry codes, except the brewers' code, and it was made unlawful for any person to engage in these industries without a federal permit to do so. Permits were issued upon a showing of business experience, financial standing and trade connections, sufficient to satisfy the government that the business would be lawfully conducted, and were made revocable after hearing for violation of any of their terms or conditions.

Congress perpetuated this permit system when it enacted the Federal Alcohol Administration Act, and made it more effective by providing that permits should be conditioned not only upon the observance of fair trade practices but upon the observance as well of all federal laws relating to liquor. With reference to the adoption of the basic permit system, the Senate Committee on Finance in its report on the Federal Alcohol Administration bill[23] said, "The revenue cannot be adequately protected, the 'tied-house' control cannot be curbed, the public cannot be protected from unscrupulous advertising, the consumer cannot be protected from deceptive labeling practices; in short, the legalized liquor traffic cannot be effectively regulated if the door is left open for highly financed gangs of criminals and racketeers to enter into the business of liquor production and distribution."

Under the Federal Alcohol Administration Act no person is entitled to a basic permit if he (or in the case of a corporation any of its officers, directors or principal stockholders) has, within five years prior to date of application, been convicted of a felony under federal or state law or has, within three years prior to date of application, been convicted of a misdemeanor under any federal liquor law. It is also provided that permits be denied to persons who by reason of business experience, financial standing or trade connections are not likely to commence operations within a reasonable period or maintain operations in conformity with federal law. No permit may be issued to authorize operations which would be in violation of the laws of the state in which they are proposed to be conducted.

All permits are conditioned upon the fair trade practice sections of the Federal Alcohol Administration Act, with the Twenty-first Amendment and laws relating to the enforcement thereof, and with all other federal laws relating to distilled spirits,

[22] 21 Stat. 145 (1880).
[23] Sen. Rep. No. 1215, 74th Cong., 1st Sess. (1935).

wines and malt beverages, including taxes with respect thereto. Any permit after notice and opportunity for hearing may be annulled for fraudulent procurement, revoked for two years' inactivity, suspended for a first violation of any of its terms and conditions, and revoked for any subsequent violations of its conditions. In any case where the business covered by the permit is leased, sold or otherwise voluntarily transferred, the permit is automatically terminated, making necessary the procurement of new permits by the new proprietors.

An appeal may be taken from any order denying, suspending, revoking or annulling a basic permit by filing within sixty days after the entry of such order, a written petition in the circuit court of appeals for the circuit wherein the permittee or applicant resides or has his place of business, or in the United States Court of Appeals for the District of Columbia. The proceedings are not *de novo,* but upon the record filed by the administrative department. The court is empowered to affirm, modify, or set aside the order in whole or in part but the findings of the administrative department as to the facts, if supported by substantial evidence, are conclusive. In any case where a petition is filed in the circuit court of appeals the commencement of the proceedings, unless specifically ordered by the court to the contrary, operates as a stay of the order.

Only two cases have so far arisen in which appeals have been taken under this Act from orders denying or suspending permits, *Atlanta Beer Distributing Co., Inc. v. Alexander*[24] and *Arrow Distilleries, Inc. v. Alexander*.[25] In the *Atlanta Beer* case an application for permit was denied because the president and sole stockholder of the company was convicted of liquor law violations, more than three years prior to the date of application and by reason of that fact the company was not regarded as likely to maintain its operations in conformity with federal law. Petitioner contended that he was not convicted of a felony within five years of the date of his application, nor of a misdemeanor within three years, and could not therefore be denied a permit on the ground specified. The court held otherwise. An attack was made upon the constitutionality of the permit requirements of the Act but it was held not competent to make such an attack in a proceeding for a license under the Act.

In the *Arrow* case an appeal was taken from an order suspending the company's permit for several violations of its terms and conditions. The facts were held to support the action taken, and in passing upon the constitutional question the court said:[26]

> "We are of the opinion that it is clearly within the power of Congress to make it unlawful for one to engage in the operations of rectifying, distilling and bottling alcoholic liquors for *interstate* trade without first obtaining a permit from the United States. Also we think Congress has the power to condition a permit upon compliance with the requirements of the Alcohol Administration Act, the twenty-first Amendment, and laws relating to the enforcement thereof, and to all other federal laws relating to distilled spirits, wine, and malt beverages." (italics supplied)

[24] 93 F. (2d) 11 (C. C. A. 5th, 1937).
[25] 109 F. (2d) 397 (C. C. A. 7th, 1940).
[26] *Id.* 401.

Whether or not the Act is valid in so far as it purports to require permits to cover the distribution of alcoholic beverages solely intrastate, or the production of alcoholic beverages exclusively for intrastate sale, has been left undecided. Should the constitutionality of the permit system, as applied to purely intrastate transactions, be rested exclusively upon the power of Congress to regulate interstate commerce, it would be of doubtful validity. The Court points out in the *Arrow* decision, however, that it is not necessary that the Act as a whole rest upon a single power of Congress. According to Section 3 of the Act,[27] Congress, in prescribing the permit system, was exercising its power not only to regulate interstate commerce but likewise to protect the revenue, to enforce the postal laws, and to enforce the Twenty-first Amendment. Whether the permit system as applied to wholly intrastate operations is valid because essential to revenue protection, or is an appropriate means of preventing the shipment of liquor across state lines for unlawful delivery or use in contravention of the Twenty-first Amendment, must be left to future decisions of the courts.

Restrictions on Bulk Sales

There was no federal pre-Prohibition limitation upon the movement of alcoholic beverages into wholesale and retail channels in bulk containers. Restrictions upon bulk shipments appeared for the first time in the distillers', rectifiers' and importers' codes adopted pursuant to the National Industrial Recovery Act. It was required by these codes that all distilled spirits be bottled at a distilling or rectifying plant, or in the case of imports by the foreign shipper.

The post-Repeal policy that distilled spirits destined for the consumer trade be packaged in bottles, was based primarily upon revenue considerations. Were wholesalers and retailers permitted to have bulk goods on the premises it would facilitate the use of these premises as outlets for bootleg liquor, since the refilling of bulky containers with untaxpaid liquor from bootleg sources would be a simple matter and difficult of detection.

When the N. I. R. A. codes were invalidated by the Supreme Court decision in the *Schechter* case[28] steps were taken to secure legislation continuing these restrictions upon bulk sales. Provisions to accomplish this end incorporated in the bill to create the Federal Alcohol Administration provoked heated debate in Congress. The House originally favored relaxation of the restrictions on bulk sales, contending that the cooperage industry would be benefited thereby, that the price of whisky to the consumer would be lower, and that such action would tend to prevent monopolization of the liquor container business by bottle manufacturers. The Senate on the other hand opposed bulk distribution and insisted that all distilled spirits be packaged at the source, in containers of one gallon or less capacity, in order to insure against tax evasions, misbranding and adulteration. The House receded from its original position and as a consequence the Federal Alcohol Administration Act, as passed, prohibits sales of distilled spirits in containers of more than one gallon capacity except

[27] 27 U. S. C. §203.

[28] *Supra* note 10.

to distillers, rectifiers, bonded warehouse proprietors, wine producers, industrial alcohol plants, and state and federal agencies. It is also made unlawful for any class of persons, except those referred to, to engage in bottling operations. No proceedings have yet been instituted in the courts challenging the validity of the legislation.

Restrictions upon bulk sales have thus far been applied only to distilled spirits. No federal curtailment has ever been placed upon the use of barrels or kegs in shipping malt beverages and wines into wholesale, retail and consumer channels. A trend toward the wider distribution of these products in bottles and cans is, however, noticeable. Prior to Prohibition only 25% of the beer consumed in the United States was bottled beer. Today packaged beer sales are approximately 50% of the total.[29]

Regulation of Bottle Manufacturers and Bottle Sizes

The bulk sales legislation, supplemented by a Joint Resolution of Congress, approved June 18, 1934, "To protect the revenue by regulation of the traffic in containers of distilled spirits"[30] has revolutionized the pre-Prohibition system of liquor distribution. The supervised producer superseded the wholesale and retail dealer as a bottler of spirits. The unlabeled flask in which a large percentage of the pre-Prohibition whiskey was dispensed from retail saloons and taverns has disappeared from the legitimate market. The distiller has become a national distributor of bottled goods. He now bids directly for the consumer trade, as well as the trade of the wholesaler and retailer, and competition between producers, evidenced by advertising on a much larger scale than ever before, is based upon the brand or trade name on the labeled bottle, rather than upon the contents of the barrel as formerly.

With this change in merchandising policy has come a new type of federal regulation. No control was exercised by the Federal Government prior to Repeal over the sizes of liquor bottles, or with respect to their manufacture or use. Rigid restrictions are now imposed by the Alcohol Tax Unit upon the manufacture, sale, resale, possession, use and reuse of liquor bottles.[31] No person is authorized to manufacture liquor bottles unless he has procured a permit to do so from the Alcohol Tax Unit of the Bureau of Internal Revenue. Premises in which liquor bottles are manufactured or stored must be of sound construction and adequately protected to insure against the diversion of the bottles to unauthorized sources. Bottle manufacturers operating under permit are precluded from selling or disposing of liquor bottles except to authorized bottlers of distilled spirits. The importation of empty liquor bottles, with certain exceptions, is prohibited and the possession of used liquor bottles by any person other than the one who emptied the contents of the bottle is prohibited. Bottles intended for use in packaging distilled spirits must have blown therein symbols identifying the bottle manufacturer, the distilled spirits bottler, and also the phrase "Federal law forbids sale or reuse of this bottle."

Under the Federal Alcohol Administration Act regulations have also been pre-

[29] See PERSONS, BEER AND BREWING IN AMERICA (Rev. ed. 1940) 18.
[30] 48 STAT. 1020 (1934); INT. REV. CODE §2871 (1939) (hereafter cited I. R. C.).
[31] A. T. U., Reg. 13.

scribed[32] standardizing the sizes of bottles in which liquor may be packaged, and prohibiting the marketing of liquor in containers other than those of the sizes prescribed. Under these regulations the standards of fill for all distilled spirits, whether domestically manufactured, domestically bottled, or imported, are 1 gallon, ½ gallon, 1 quart, ⅘ quart, 1 pint, ½ pint, ⅛ pint, and 1/10 pint. In addition to these sizes a 1/16 pint container is authorized for use in packaging brandy and a ⅘ pint size container is authorized for brandy and rum, Scotch and Irish whisky, and Scotch type and Irish type whisky.

Strip Stamps Denoting Tax Payment

The Liquor Taxing Act of 1934,[33] approved January 11, 1934, introduced for the first time a federal requirement that all distilled spirits bottles have affixed thereto a stamp denoting the quantity in the container and evidencing the payment of all internal revenue taxes due thereon. Prior to Prohibition the only bottled distilled spirits to which federal strip stamps were affixed were spirits bottled under the Bottling in Bond Act of March 3, 1897.[34] Under this act it was provided that spirits of the same kind, produced at the same distillery, by the same distiller, in the same distilling season, and aged four years or more, might be mingled together and bottled in bond, and that every bottle should have affixed thereto, by passing over the mouth of the same, an adhesive engraved strip stamp to be prescribed by the Commissioner of Internal Revenue. The strip stamps prescribed for use under the Bottling in Bond Act, and in use since the act was passed in 1897, have been intended only to denote that the product is an authentic distillery-bottled product meeting the specifications of the Bottling in Bond Act, and was never intended as a means of distinguishing between bootleg liquor and liquor which had been taxpaid.

The new policy adopted in the Liquor Taxing Act of 1934, which requires the affixing of strip stamps denoting taxpayment to all distilled spirits containers, has as its objective the suppression of bootleg operations, in that liquor in bottles which do not have affixed thereto genuine federal strip stamps over the mouth can be definitely identified as untaxpaid products introduced into the market by illicit operators.

Strip stamps under this act and under the Bottling in Bond Act are issued by the Commissioner of Internal Revenue to each collector of internal revenue in the number necessary to meet the requirements of his district, and are sold by the collectors under rigid regulations to persons entitled to bottle or import distilled spirits. The stamps sell for one cent each, except for containers of less than one-half pint, in which case the price of the stamp is ¼ of one cent. The revenue derived from the sale of stamps is, of course, in addition to the internal revenue taxes collected on the spirits. It is specifically required by law that any person emptying a liquor container immediately destroy the stamp thereon. All distilled spirits found in unstamped containers are forfeited to the United States. Any person violating the provisions of the

[32] F. A. A., Reg. 5.
[33] I. R. C. §2803.
[34] 29 STAT. 626 (1897).

act, or who counterfeits any stamp, or has in his possession any counterfeited stamp, or plate or dye used in its manufacture, or has in his possession any paper in imitation of the paper used in the manufacture of such stamps, or who reuses any stamp, upon conviction may be punished by a fine not to exceed $1,000, or by imprisonment at hard labor not exceeding five years, or both.

Control of Sources of Supply for Raw Materials

If illicit distillery operators were unable to procure raw materials from which alcohol could be distilled there would be no bootleg liquor problem. Congress, since Repeal, in recognition of this fact, has seen fit to give the Commissioner of Internal Revenue some control over the sources of supply for distilling materials. Joint Resolution 373, approved June 18, 1934,[35] "To protect the revenue by requiring information concerning the disposition of substances used in the manufacture of distilled spirits" provides:

> "Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Commissioner, render a correct return in such form and manner as the Commissioner, with the approval of the Secretary of the Treasury, may by rules and regulations prescribe, showing the names and addresses of the persons to whom such disposition was made, with such details, as to the quantity so disposed of or other information which the Commissioner may require as to such disposition, as will enable the Commissioner to determine whether all taxes due with respect to any distilled spirits manufactured from such substances have been paid."

In pursuance of this authority regulations have been prescribed[36] to facilitate the tracing of substances such as molasses, sugar, yeast, cider, malt, oak chips, corn meal, cracked corn and bran to illicit distilling plants. It is provided in these regulations that every person in the United States who consigns, sells or otherwise disposes of these substances (other than such small dealers as are specifically exempted) shall keep such books, records, invoices and bills of lading relating to each consignment, as will show the date of sale, the quantity and kind of material sold, the names and addresses of the purchaser and the consignee, the date and method of shipment or delivery, the registration number of the truck in which delivered, the driver's name and address, the name and address of the person to whom delivered and the exact date of delivery. This information must be supplied, under penalty, in the form of a report when called for in writing by the Commissioner of Internal Revenue or his authorized representative. Similar regulations have been prescribed[37] requiring records and reports upon shipments of denatured alcohol, denatured rum, ethyl acetate, and all liquid substances or preparations containing more than 25 percent by volume of denatured alcohol or denatured rum.

The constitutionality of the raw materials resolution was early challenged in the courts, and its validity has been upheld in several cases in the circuit courts of appeal,

[35] I. R. C. §2811.
[36] A. T. U., Reg. 17.
[37] *Id.*, Reg. 92.

in three of which *certiorari* was denied by the Supreme Court.[38] In the *Goldsmith* case the Circuit Court of Appeals for the Second Circuit stated:[39]

"One who disposed of the substances covered by the resolution, of which sugar was certainly one, was liable under the law to make such reports designed to provide the check which the Commissioner might find he needed in determining whether all of the taxes mentioned were paid. Congress could provide him with the means for obtaining such information in whatever detail might be necessary and that it preferred to let the Commissioner decide as to the need in the actual administration of the law rather than to require all dealers in such substances make reports, often perhaps wholly unnecessary and unwanted, curtailed the rights of no one. One who disposed of such substances might well insist that he be required to furnish only such information as would enable the Commissioner to make his determination regarding the payment of taxes but he could have no rights infringed because the Commissioner did not require all, or others, who also disposed of such substances to give information too. We think this delegation of power was properly limited to administrative details within *United States v. Grimaud, supra,* and that is so regardless of the fact that the regulations there involved only dealt with public lands. These regulations deal with the public revenue and, though it may be that they more closely affect private rights we believe the resolution is so limited that action within its scope was lawful."

ALCOHOL TAX UNIT AND ITS FUNCTIONS

Prior to 1934 the internal revenue laws relating to liquor were administered by the Bureau of Industrial Alcohol of the Treasury Department. This Bureau was abolished by Executive Order,[40] and in May, 1934, a new Unit of the Internal Revenue Bureau was created[41] known as the Alcohol Tax Unit, headed by a Deputy Commissioner of Internal Revenue. The Alcohol Tax Unit, prior to July 1, 1940, upon which date it took over the functions of the Federal Alcohol Administration, was charged with the administration, under the direction of the Commissioner of Internal Revenue, of the internal revenue laws concerning the following subjects:

(1) the establishment, construction, operation, custody, and supervision of distilleries, industrial-alcohol plants, bonded warehouses, denaturing plants, wineries, bonded-wine storerooms, breweries, rectifying houses, dealcoholizing plants, cereal beverage plants, and other places at which such spirits, liquors, or liquids are produced or stored;

(2) the determination, assertion, and assessment of all internal revenue taxes and penalties pertaining to distilled spirits, alcohol, wines, fermented liquors, cereal beverages, denatured alcohol, denatured rum, and articles containing denatured alcohol or denatured rum, and other such liquors and liquids, and the compromise thereof (all moneys are received and accounted for by the collectors of internal revenue);

(3) the investigation, prevention, and detection of violations of the laws pertaining to the products referred to, and any regulations issued thereunder, and the apprehension of offenders against such laws;

[38] U. S. v. Goldsmith, 91 F. (2d) 983 (C. C. A. 2d, 1937), *cert. denied,* 302 U. S. 718 (1937); Nick Dano v. U. S., 91 F. (2d) 1012 (C. C. A. 3d, 1937); DiSanto v. U. S., 93 F. (2d) 948 (C. C. A. 6th, 1937), *cert. denied,* 303 U. S. 662 (1938); U. S. v. Tishman, 99 F. (2d) 951 (C. C. A. 7th, 1938), *cert. denied,* 306 U. S. 636 (1939).

[39] 91 F. (2d) at 985-986.

[40] Exec. Order 6639, Mar. 10, 1934.

[41] U. S. Treas. Dec. 4432, 4662.

(4) the detention and seizure, for violation of internal revenue liquor laws, of property, whether real or personal, except seizures under distraint warrant, and the custody, control, sale, and disposition of property so seized;

(5) the regulation of the size, branding, marking, sale, resale, possession, use, and reuse of containers used for the sale of distilled spirits at retail, and the issuance, suspension and revocation of permits for the manufacture, storage, procurement and transportation of such containers.

Abolition of Federal Alcohol Administration

Up until July, 1940, the responsibility for regulating the alcoholic beverage industries was divided between two agencies of the government, each of which was a part of the Treasury Department. The Alcohol Tax Unit supervised all branches of the industry for tax collection purposes, and was devoted to apprehending and punishing liquor tax evaders. The Federal Alcohol Administration, created as a Division of the Treasury Department by the Federal Alcohol Administration Act on August 29, 1935, regulated the trade practices of the industry and administered the basic permit system established by that act. It was the duty of this agency to enforce those provisions of the Federal Alcohol Administration Act which prohibited exclusive outlets, tied-houses, commercial bribery and consignment or conditional sales; to promulgate and enforce regulations relating to labeling and advertising of alcoholic beverages; to enforce those provisions of the act restricting the sale of distilled spirits in bulk; and to prevent the combination through interlocking directorates of business enterprises engaged in production, importation or distribution, where such combinations tended to burden interstate commerce. The fact that the basic permits issued under the Federal Alcohol Administration Act were not conditioned solely upon the observance of fair trade practices, or upon compliance with regulations issued by the Federal Alcohol Administration, resulted in divisions of responsibility and overlapping of functions.

One of the purposes of the Federal Alcohol Administration Act, as stated in its title, is to "further protect the revenue derived from distilled spirits, wine and malt beverages," and the basic permits issued to the industry under that act have been conditioned, among other things, upon compliance with the Twenty-first Amendment and laws relating to the enforcement thereof, "and with all other Federal laws relating to distilled spirits, wine and malt beverages, including taxes with respect thereto." In cases where permit holders violated internal revenue laws, and were apprehended in such violations by the Alcohol Tax Unit, proceedings against the basic permits of the violators were instituted by the Federal Alcohol Administration. To that extent the responsibility for enforcing even the internal revenue laws relating to liquor became a divided responsibility. The same overlapping of functions was evident in other phases of liquor control, such as labeling. The Alcohol Tax Unit, for internal revenue purposes, controlled the labeling of products intended for intrastate distribution while the Federal Alcohol Administration regulated the interstate aspects of the question. With respect to the labeling of merchandise for interstate sale, internal

revenue officers on duty at bottling plants had the responsibility of seeing to it that the proper labels were affixed, and were required to prevent the removal of merchandise from the plant unless the bottler possessed the necessary certificates of label approval issued by the Federal Alcohol Administration.

This situation led to the abolition of the Federal Alcohol Administration by Reorganization Plan No. 3, transmitted to Congress by the President on April 2, 1940, pursuant to the Reorganization Act of 1939.[42] Section 2 of this plan provides:

"Sec. 2. *Federal Alcohol Administration.*—The Federal Alcohol Administration, the offices of the members thereof, and the office of the Administrator are abolished, and their functions shall be administered under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue in the Department of the Treasury."

In transmitting this plan to Congress the President stated:[43]

"I propose, therefore, that the functions of the Federal Alcohol Administration be correlated with the activities of the Bureau of Internal Revenue, particularly its Alcohol Tax Unit. The Bureau is already performing a large part of the field enforcement work of the Administration and could readily take over complete responsibility for its work. The Bureau is daily making, for other purposes, a majority of the contacts with units of the liquor industry which the Federal Alcohol Administration should but cannot make without the establishment of a large and duplicating field force. Under the provisions of this plan, it will be possible more effectively to utilize the far-flung organization of the Treasury Department, including its many laboratories, in discharging the functions of the Federal Alcohol Administration. Thus, I find the proposed consolidation will remedy deficiencies in organization structure as well as afford a more effective service at materially reduced costs."

The powers vested in the Secretary of the Treasury by this legislation were delegated by him on June 12, 1940, to the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit. Almost immediately the basic permit system theretofore centrally administered out of Washington, was decentralized into the fifteen Alcoholic Tax Unit field offices scattered throughout the country, and the power and duty to issue, amend, deny, revoke, suspend and annul basic permits under the supervision and direction of the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit was delegated to the district supervisors in charge of the field offices.[44]

The duty of regulating the alcoholic beverage industries has now become vested in one agency of the government, the Alcohol Tax Unit of the Internal Revenue Bureau, except for such functions as may be exercised by the Bureau of Customs of the Treasury Department in connection with the release of merchandise from customs custody for domestic consumption and the suppression of smuggling operations. Although the Federal Trade Commission has jurisdiction over false advertising by virtue of the recent Wheeler-Lea amendment to the Federal Trade Commission

[42] 53 Stat. 561 (1940). [43] *Ibid.*
[44] U. S. Treas. Dec. 4975 (June 12, 1940), 4982 (July 11, 1940).

Act,[45] and the Food and Drug Administration has jurisdiction over labeling under the terms of the new Food, Drug and Cosmetic Act[46] these agencies have seldom undertaken to exercise jurisdiction in matters of labeling, advertising or trade practices which are specifically covered by provisions of the Federal Alcohol Administration Act.

Decentralized Control

The Alcohol Tax Unit regulates the alcoholic beverage industry under a decentralized control system, with the Washington office devoting itself primarily to promulgating regulations for the control of the industry, and supervising and instructing field officers in the performance of their duties, to insure uniformity and efficiency of office and investigative procedure. Even with the increased functions assumed since the abolition of the Federal Alcohol Administration, there are few matters in which original action is taken by Washington. These include: (1) the examination and approval of blue prints and plans showing construction or changes in construction of plants producing and processing distilled spirits, and the examination and approval of indemnity bonds, and bonds given by the proprietors of such plants to insure payment of internal revenue taxes due upon the alcoholic products produced; (2) giving recommendations to the Department of Justice, upon applications for pardon or parole made by prisoners committed for liquor violations; (3) receiving copies of all reports from field offices disclosing violations of internal revenue laws, and computing therefrom and assessing the internal revenue taxes and penalties imposed by law, such taxes and penalties after assessment being listed for collection by the various collectors of internal revenue; (4) acting upon claims for abatement and refund of liquor taxes alleged to have been erroneously assessed or collected; (5) acting upon offers in compromise of civil or criminal liability incurred for violation of internal revenue liquor laws; (6) acting upon petitions for mitigation or remission of forfeitures of motor vehicles and other property seized and forfeited under internal revenue liquor laws; (7) acting upon applications for certificates of label approval filed under the Federal Alcohol Administration Act; (8) examining for compliance with law and regulations advertising copy appearing in daily newspapers and national magazines, and informally passing upon proposed liquor advertising copy submitted by the industry for criticism in advance of publication; (9) acting upon interlocking directorate applications in cases where the taking of office in more than one company engaged in business as a distiller, rectifier or blender of distilled spirits is contingent upon the receipt of the Deputy Commissioner's approval thereto under the Federal Alcohol Administration Act.

The total personnel of the Washington office of the Alcohol Tax Unit is only 198 out of a total personnel of approximately 4,400 assigned to Unit activities. There are 15 field offices of the Unit scattered throughout the United States, each such office being in charge of a district supervisor, in whom is vested the direct and primary

[45] 52 STAT. 114, 15 U. S. C. §52 (1938).

[46] 52 STAT. 1046, 21 U. S. C. §341 (1938).

responsibility in his district of: (1) investigating, preventing and detecting violations of federal liquor laws, apprehending offenders against such laws, and reporting violations to the United States Attorney for prosecution; (2) detaining and seizing alcoholic beverages and other types of property, real and personal, made subject to forfeiture for violations of internal revenue liquor laws and disposing of the property so seized; (3) supervising operations of all lawfully established distilleries, industrial alcohol plants, bonded warehouses, denaturing plants, wineries, bonded wine storerooms, breweries, rectifying houses, dealcoholizing plants, cereal beverage plants, and other places at which such spirits or liquids are produced or stored; (4) passing upon applications for permits under the internal revenue laws to manufacture industrial alcohol, procure it taxfree, denature it, and deal in, use or transport specially denatured alcohol and alcohol taxfree, and citing such permits for revocation, holding hearings thereon, and revoking the same for violations of their terms and conditions; (5) issuing, suspending and revoking permits for the manufacture, storage, procurement and transportation of bottles designed or intended for use for the sale at retail of distilled spirits; and (6) acting upon all applications for permits filed by importers and wholesalers of distilled spirits, wine and malt beverages, producers, blenders and rectifiers of wine, and distillers, rectifiers, blenders and bottlers of distilled spirits for beverage use, under the Federal Alcohol Administration Act, and suspending, revoking and annulling such permits after hearing for violation of their terms and conditions.

Scope of Supervision Exercised over Industry

Under the internal revenue laws the tax attaches to alcohol as soon as this substance is in existence as such, whether it be subsequently separated as pure or impure spirit, or transferred into any other substance, either in the process of original production or by any subsequent process.[47] In regulating and supervising the liquor industry, however, the government does not wait until alcohol is present in a fermenting mash before exerting its regulatory powers, nor does it cease its vigilance over the industry at the moment of tax payment.

(a) *Construction and equipment of plants*—Rigid specifications are imposed with respect to the construction and equipment of all plants in which distilled spirits, wines or malt beverages are produced, stored, bottled or rectified. The regulations governing the construction and equipment of distilling plants, although more rigid than those governing the construction and equipment of breweries and wineries, because of the higher rate of tax applicable to the product, are typical. A distilling plant may not be located in any dwelling house or on board any vessel or boat, or in any building where beer, vinegar or ether is manufactured, or where sugars or syrups are refined, or where liquors of any description are retailed, or within six hundred feet in a direct line from a vinegar factory using the vaporizing process.[48] The distillery buildings must be securely constructed of brick, stone, wood, concrete

[47] I. R. C. §2800(a).

[48] I. R. C. §2819.

or other substantial material and must be completely separated by unbroken partitions of substantial construction from contiguous buildings. Specifications are laid down with respect to the construction of the foundations, floors, walls, roofs, and doors, and requirements are imposed for the protection of windows, skylights and ventilators with iron bars and metal grates, where so located as to provide any opportunity for access to the premises. Portions of the premises intended for storing grain, storing empty containers, fermenting the mash, distilling the spirits, and storing the finished product must be separated by partitions. The distiller is required to provide and maintain on the premises, for the exclusive use of government officers, a furnished room for the preparation and safe keeping of government records. No fence or wall of a height greater than five feet may be erected around distillery premises without special permission, and keys to the gates or doors of any fence or wall surrounding a distillery must be furnished to government officers.

The distillery once erected in accordance with the rigid specifications imposed as to construction, must be equipped to meet the requirements of regulations equally as rigorous. Laboratory apparatus suitable for the testing of samples must be provided, as well as scales for weighing packages of distilled spirits and grains and other materials entering into their manufacture. Weighing tanks must be constructed to specifications, and secured with government locks. To insure accuracy of measurement there must be provided upon the premises testing weights conforming to the requirements of the National Bureau of Standards. The door of each still furnace or boiler must be so constructed that it may be closed or locked with a government lock, unless the stills are heated with steam, in which case the pipe lines used to convey the steam to the stills must be provided with valves equipped for locking with government locks at the point where they enter the still. Chutes or pipe lines used for conveying distilling material into the premises must be similarly equipped, as well as the inlets and outlets to all stills. Specifications are laid down for construction of fermenters, stills, tanks, rectifying equipment, receiving cisterns, and in the case of pipe lines, these specifications go to the detail of prescribing the color which pipes shall be painted. Pipe lines conveying spirits, vapors, mash, fermenting materials, residue, water, steam, air and carbon dioxide are all required to be of different colors.

Accurate plats and plans of the distillery premises, apparatus and equipment, drawn to scale, must be filed with the district supervisor, showing the outer boundaries of the distillery premises by courses and distances. The plans must include a floor plan of each floor of the building, showing the dimensions of the floors and rooms, location and dimensions of all doors, windows and other openings, and the location of all pipe lines, government locks, apparatus and equipment. Similar plats and plans are also required to be filed, and examined for compliance with internal revenue structural requirements, in the case of rectifying plants, bonded warehouses, taxpaid bottling premises, breweries, and wineries.

(b) *Bonds*—Whenever any distiller defrauds or attempts to defraud the United States of tax, the distillery and distilling apparatus used by him, and all distilled spirits

and raw materials on the premises, are forfeited.[49] The tax is a first lien on the spirits distilled, the distillery itself, and the real estate upon which the distillery is located. The lien attaches at the time the spirits come into existence as such and remains attached until the tax is paid.[50] Where the distiller is not the owner in fee, unencumbered, of the land on which the distillery is located, or is not the owner of the equipment, unencumbered, he must file with the district supervisor the written consent of the owner and of any mortgagee, judgment creditor, conditional sales vendor, or other lienor or lessor, that the property may be used for distilling spirits, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority over any right, title or interest of the person giving the consent, and that in case of forfeiture of the distillery premises or property, or any part of it, the title shall vest in the United States, discharged from any such right, title or interest. Where the consent of the owner cannot be obtained, provision is made for the filing by the distiller of an indemnity bond in lieu of consent, the penal sum of the bond being equal to the appraised value of the land, buildings and apparatus used by the distillery.[51]

In addition to the indemnity bonds given by the distiller, in cases where the owner of the property or equipment will not stipulate that the lien of the United States for taxes and penalties shall have priority, the distiller must give a separate bond with surety or collateral security in the maximum amount of $100,000, but not less than the amount of the internal revenue tax upon the maximum quantity of the distilled spirits that can be produced in the plant in a fifteen-day period.[52] This bond is conditioned on faithful compliance with all revenue laws, including those provisions relating to the payment of tax, and upon the payment of all penalties incurred, or fines imposed for the violation of such laws. Similar bonds varying in the amount of penal sum, depending upon the class and scope of operations conducted, are also required to be filed and approved as a condition precedent to the operation of any brewery, winery, bonded warehouse or rectifying plant.

No person may commence business as a distiller, rectifier, brewer or wine maker until the required bonds have been filed and approved by the Commission of Internal Revenue, or his duly authorized representative.[53] The Commissioner is authorized to disapprove any bond if the individual, partnership, corporation or association giving the same, or owning, controlling or actively participating in the management of the business, has been previously convicted in a court of competent jurisdiction (1) of any fraudulent non-compliance with any provision of any law of the United States relating to internal revenue or customs taxation of alcoholic beverages, or if the offense is compromised, or (2) of any felony under any state or federal law prohibiting manufacture, sale, importation or transportation of alcoholic beverages.[54] In the case of distilleries, provision is also made for the disapproval of the bond in

[49] I. R. C. §2806(f).
[50] I. R. C. §2800(e).
[51] These provisions of law and regulations are not applicable to brewers, wineries or rectifying plants.
[52] I. R. C. §2814.
[53] I. R. C. §2815(c).
[54] I. R. C. §2815(d).

cases where the situation of the distillery, *viz.*, its physical location and construction, is such as would enable the distiller to defraud the United States.[55] All changes and alterations in plant construction or equipment must also be approved by the Alcohol Tax Unit.

(c) *Permits*—The requirements of internal revenue laws and regulations with respect to plant construction and the posting of bonds having been complied with, application must be filed with the district supervisor for a basic permit under the Federal Alcohol Administration Act. All distillers, rectifiers, blenders and bottlers of beverage spirits, all producers, blenders and rectifiers of wine, and all importers and wholesalers of spirits, wine and beer are required to obtain such permits. Brewers are exempt from the permit requirements of this act.[56] Although convictions for felonies or misdemeanors within the period specified in the statute furnish an absolute bar to the issuance of a permit, there is nevertheless vested in the district supervisors the discretion to disapprove applications from persons who have not been convicted but who, because of business experience, financial standing, or trade connections, are not likely to operate in conformity with federal law. However, no application for permit may be disapproved until the applicant has been afforded due notice and opportunity for hearing on the application.

(d) *Production, storage and tax payment*—The degree of physical supervision by the Alcohol Tax Unit over plant operations varies according to the type of operations conducted. Thus, in the case of wineries, where the rate of federal tax on the product is low, grapes and other wine producing materials may be fermented into wine and the wine may be barreled, or bottled, and shipped with practically no direct government supervision over operations.[57] The wine producer is required to keep records showing the nature and amounts of materials received in the plant for use in producing wine, and the quantity of wine manufactured therefrom, and reports of operations must be made on prescribed forms to the district supervisor periodically. The supervision over winery operations consists in the main of periodical inspections of the winery, examination of inventory of stock on hand, checking of raw materials received into the plant as against the quantities of wine produced, the examination of records showing the amount of wine removed from the plant, and the comparison thereof with records showing the amount of taxes paid. The tax upon wine is paid at the time of its removal for consumption or sale, the fact of tax payment being evidenced by internal revenue tax stamps of appropriate denominations affixed to the cask, barrel or keg in which the wine is contained. In the case of bottled wine, no

[55] I. R. C. §2814(a)(1).

[56] The provisions of the Federal Alcohol Administration Act, relating to the issuance, suspension, revocation and annulment of permits are discussed *supra* pp. 574 *et seq.*

[57] The present tax rates on alcoholic beverages are: distilled spirits generally $3.00 a proof gallon and brandy $2.75; beer $6.00 per barrel of 31 gallons; wines less than 14% alcohol, 6 cents a gallon, wines from 14 to 21%, 18 cents per gallon, wines from 21 to 24%, 30 cents a gallon, champagne 3 cents a half pint, artificially carbonated wine, and cordials and liqueurs containing wine, one and a half cents a half pint. I. R. C. §§2800, 3030, 3150 as recently amended by the Revenue Act of 1940, Pub. L. No. 565, 76th Cong., 3d Sess. (June 25, 1940).

stamp evidencing tax payment is required to be placed upon the immediate container, but a stamp of proper denomination must be affixed to all cases in which the individual bottles are packed.

In the case of brewers, the physical supervision over operations is more extensive, due in part to the higher rate of tax imposed upon beer and to the additional fact that brewers may produce, in addition to beer, untaxed products such as cereal beverages, malt syrups, and yeast. Complete records of all operations must be maintained and detailed reports of operations made periodically to the district supervisor. Stamps of various denominations for the tax payment of beer are available in the offices of the various collectors of internal revenue and are supplied, upon requisition, only to brewers. Prior to affixing the stamp to the barrel or keg it must have perforated therein the name of the brewer, and the stamp itself must be firmly affixed over the spigot hole of the barrel in such manner that it will be destroyed at the time of tapping, when the faucet is driven through the spigot hole. No beer may be removed from the place where produced, for domestic consumption, until the tax thereon has been paid, unless a special permit has been obtained authorizing the removal of the beer to a warehouse for temporary storage before tax payment. In breweries where cereal beverages, upon which no federal taxes are due, are produced, the removal thereof for bottling is under the immediate supervision of a government inspector, as is also beer withdrawn for export free of tax. While the Government does not maintain inspectors on duty constantly at breweries, for the purpose of supervising operations and insuring the payment of tax upon the beer removed, meters are installed in all brewery bottling houses, and the quantity of beer which runs from the brewery into the bottling house by pipe line is registered upon the meter as it goes into the bottling tank. Meters are also installed upon all racking machines in breweries, which register the quantity of beer going into barrels or kegs. These meters are regularly read by government inspectors assigned for that purpose, and checked against brewery production and inventory records to insure full payment of taxes due. In the case of bottled beer, no federal stamp denoting tax payment is affixed either to the bottle or to the case or carton in which the bottles are packed. The tax upon bottled beer is paid through the cancellation, by the brewer, of tax stamps in the proper denominations and amounts and the surrender of such cancelled stamps to the government inspector at the time he reads the meter and calculates the amount due.

In contrast with breweries and wineries the Government maintains constant physical supervision over all distillery operations, with certain exceptions applicable to the operations of fruit distilleries. One or more government officers, known as storekeeper-gaugers, must be on duty at each distillery before the distiller can commence operations. In some cases where operations are extensive, as many as twenty storekeeper-gaugers may be constantly on duty. Regulations governing the operation of distilleries[58] provide that the storekeeper-gauger will have charge of the distillery

[58] A. T. U., Regs. 4 and 5.

to which he is assigned, under the direction of the district supervisor. In the course of his daily duties he is required to observe the character and condition of all connections, pipes, tanks or vessels used in conveying spirits in the course of distillation, to see that they are continuous and closed as required.

Distillers must weigh or measure all material received on the distillery premises, intended for use in the production of distilled spirits, and furnish signed reports thereof to the storekeeper-gauger on duty. Such materials must be stored in a room specially provided for that purpose, under a lock to which the storekeeper-gauger holds the key. Materials may not be removed for distillation except when the storekeeper-gauger is present. From time to time the storekeeper-gauger must personally verify the accuracy of the distiller's determination of the weight or quantity of materials received and used, and must determine the number of gallons of mash in each fermenter at the time of fill, and test the alcoholic content of the mash before distillation. No mashing or distilling is permitted in the absence of the storekeeper-gauger from the premises. The process of distillation employed must be such that the spirits will pass through continuous closed stills, pipes and vessels from the time the vapor rises in the first still until the finished spirits are deposited in the cistern room, in locked receiving cisterns provided for that purpose. The receiving cisterns and the cistern room are under the lock and seal of the storekeeper-gauger, and the doors and other openings of the cistern room are locked at all times with government locks, except when spirits are being drawn off in the presence of the storekeeper-gauger. No person is permitted in the cistern room except when a government officer is present, and the keys to the government locks may not be entrusted at any time to the distiller or any person in his employ.

Although provision is made for the tax payment and immediate removal of spirits from the cistern room, in actual practice spirits such as whisky and rum are usually drawn off into barrels and deposited in a bonded warehouse for aging. No spirits can be withdrawn from the cistern room in containers of less than 10 gallons capacity, and in the case of all spirits withdrawn from cisterns the storekeeper-gauger is required to personally supervise the filling of the packages, and the marking and branding thereof prior to removal into the bonded warehouse. All barrels are required to be serially numbered and also to bear markings indicating the gross weight, tare, net weight, content in gallons, and alcoholic proof of the product. The accuracy of all markings must be verified by the government officer on duty.

All internal revenue bonded warehouses, into which distilled spirits are removed for deposit pending the payment of the tax, are in charge of a storekeeper-gauger and all such warehouses, as provided by law, are in the joint custody of the storekeeper-gauger and the proprietor.[59] The outside doors of the warehouse must be kept locked at all times with government locks except when spirits are being entered into or removed from the warehouse, or where it is necessary for the proprietor to have access to the warehouse for the purpose of repairing cooperage or other legitimate purposes. Distilled

[59] I. R. C. §§2872, 2873.

spirits entered after July 26, 1928, for deposit in an internal revenue bonded warehouse may not remain stored therein more than eight years, at the end of which time the taxes due thereon must be paid and the spirits removed.[60] During the period of storage in bond losses occur through leakage and evaporation, and allowances are made for these losses within certain limitations prescribed by Congress, based upon the period of time during which the spirits have remained in the bonded warehouse.[61] At the time of removal from bond the content of each barrel is ascertained by the storekeeper-gauger, loss allowances calculated, and stamps evidencing tax payment, in the proper denomination and amount, cancelled and affixed to the barrel under the storekeeper-gauger's supervision.

(e) *Bottling*—In view of the fact that distilled spirits are not permitted to be distributed in wholesale, retail or consumer channels, for beverage use, in containers of more than 1 gallon capacity, distilled spirits removed from bond in barrels are transferred to the premises of rectifiers or other authorized bottling plants.[62] In the rectifying plant spirits may be bottled in the same condition in which they are received, in which event no additional tax is due the government, or they may be blended together, mixed with neutral spirits, colored, converted into other products such as cordials, liqueurs, cocktails and the like, or otherwise treated in such manner as to incur liability for an additional federal tax imposed upon rectified spirits.[63] Whether the distilled spirits are rectified before bottling, or bottled without rectification, all distilled spirits bottling operations are closely supervised by Alcohol Tax Unit representatives. Storekeeper-gaugers are assigned to duty at all bottling plants for the purpose of supervising bottling operations. They are required to see to it that only authorized liquor bottles are used,[64] that strip stamps denoting tax payment are affixed over the mouth of each bottle,[65] that the labels used are in conformity with federal requirements, and that the cases into which the bottles are packed have placed thereon the prescribed markings. All cases bear serial numbers and other data which enable the tracing of the origin of the product from the retail store back to the premises of the bottler. The bottler in turn maintains records of serial numbers of cases and barrels in such detail as to enable the tracing of the contents of individual cases of unrectified products back to the distillery in which produced.

(f) *Merchandising*—Wholesale and retail dealers in alcoholic beverages are required to pay occupational taxes to the Federal Government annually, varying in amount according to the type of business engaged in and the types of alcoholic beverages sold.[66] Wholesalers must keep daily records of all distilled spirits received and disposed of, showing the names and addresses of the persons from whom received and to whom sold, as well as the serial numbers of the packages. Transcripts and summaries of such records are filed monthly with the district supervisors. Retailers of liquor are not required to file any report of their operations with the Federal

[60] I. R. C. §2900. [61] I. R. C. §2901. [62] *Supra* p. 577.
[63] The rectification tax is 30 cents per proof gallon under §2800(a)(5) of the I. R. C.
[64] *Supra* p. 578. [65] *Supra* p. 579. [66] I. R. C. §3250.

Government, nor maintain records of the names of their customers, but there must be kept available for examination on retailers' premises records showing the quantities of alcoholic beverages received, the date of receipt, and the name of the vendor.[67] Government supervision of wholesalers' and retailers' operations extends only to the examination of prescribed records and reports, and periodical visits to the premises to insure that only taxpaid liquor is being dealt in; that the dealer has paid the occupational taxes imposed on the business; that the liquor is not being sold or shipped into dry states for unlawful delivery or use contrary to the Act[68] to enforce the Twenty-first Amendment and that the fair trade practice provisions of the Federal Alcohol Administration Act are being observed. The provisions of the latter act do not extend to retailer establishments but are binding upon all producers as well as wholesale distributors. Under the terms of the Federal Alcohol Administration Act and regulations promulgated thereunder, it is made unlawful for producers and distributors, subject to specified jurisdictional limitations, to create exclusive outlets or tied-houses, to sell on consignment or conditional sale, to indulge in commercial bribery, or to label or advertise falsely. All these provisions of the Federal Alcohol Administration Act which relate to the merchandising of alcoholic beverages are administered by the Alcohol Tax Unit district supervisors.

(g) *Industrial alcohol*—No treatment of the subject of government supervision over the alcoholic beverage industries would be complete without a reference to the supervision exercised over the production, denaturation and distribution of alcohol for industrial uses. The regulation of the nonbeverage alcohol industry occupies much of the time and attention of the Alcohol Tax Unit personnel. The importance of careful supervision over the industrial field is apparent from the fact that alcohol for industrial purposes is released by the Government free of tax, and unless carefully supervised, and restricted to legitimate operators, would be easily diverted into beverage channels, with resulting losses of revenue. There are approximately forty industrial alcohol plants in operation in the United States, producing more than 130 million gallons of alcohol annually for use in industry. Most of this alcohol is denatured with substances which make it unsuitable for beverage purposes, but do not destroy its suitability for use in manufacturing processes, or in the manufacture of industrial products. Completely denatured alcohol, which is so treated, under government permit, as to be made wholly unfitted for beverage use, may be sold and used with practically no limitations and without permit and bond. This product is practically all used as an anti-freeze in automobile radiators. Specially denatured alcohol on the other hand is so treated with denaturants as to permit of its use in a greater number of specialized arts and industries than is possible in the case of completely denatured alcohol. This type of alcohol is used directly or indirectly in the production of chemicals, drug extracts, pharmaceuticals, external medicinal preparations, cosmetics, shellacs, varnishes, lacquers, plastics and other industrial products. Millions of gallons of it are used in the production of smokeless powder and other

[67] I. R. C. §3252.

[68] Liquor Enforcement Act, 49 STAT. 1930, 27 U. S. C. §221 (1936).

products indispensable to national defense. Because of the character of the denaturing material used in specially denatured alcohol, it is more readily convertible into a beverage, through the removal of denaturants, than is the completely denatured product. It is thus necessary for the protection of the revenue, to be assured that this type of alcohol is in fact used for the purposes for which intended. All users of specially denatured alcohol, of whom there are more than four thousand in the United States, as well as all industrial alcohol plants, denaturing plants, and dealers, are required to secure permits from the Alcohol Tax Unit, conditioned upon the observance of applicable revenue laws. These permits are revocable, after hearing, in cases where it is found that the producer, denaturer, dealer or user has diverted the product to a beverage or other unauthorized use, and taxes are assessed and collected, at the beverage rate, on the quantities diverted.

HEARING PROCEDURE

Applications for Permits and Proceedings to Suspend, Annul or Revoke

An application for basic permit must be issued to cover each individual plant or premises where any of the businesses covered by the Federal Alcohol Administration Act permit system is engaged in, except that in the case of importers and wholesalers, one basic permit, issued in the district wherein the applicant has his main office or place of business, authorizes the general conduct of business throughout the United States in branch offices and places of business. All permits under the Federal Alcohol Administration Act, as well as all permits covering the manufacture, denaturation and use of industrial alcohol under the revenue laws, are issued by the district supervisors of the Alcohol Tax Unit. Due to the decentralization of the basic permit system covering the production and distribution of beverage spirits, following the abolition of the Federal Alcohol Administration, drastic revisions in procedure were made necessary. In order to avoid having district supervisors operate under one set of rules in issuing and revoking industrial alcohol permits, and another set of rules covering the beverage permit field, the procedure in effect for many years with respect to the issuance and revocation of industrial alcohol permits was extended to cover permits under the Federal Alcohol Administration Act, in so far as it could be made applicable, and in so far as such procedure was not in conflict with the Federal Alcohol Administration Act.[69]

Upon receipt of applications for permits executed in proper form, the district supervisor assigns inspectors to make a thorough investigation of the applicant to determine his qualifications to hold a permit, such investigation including an inquiry into the applicant's past history, his criminal record, if any, his financial standing, reputation, trade connections, and such other matters as may reflect upon his integrity and likelihood to conduct the business lawfully. In the case of industrial alcohol permits, the supervisor, upon review of the investigating officer's report, determines what action should be taken upon the application, and either approves or disapproves the permit application, without the formality of advance notice and opportunity for

[69] U. S. Treas. Dec. 4982 (July 11, 1940).

hearing to the applicant. Within fifteen days after receipt of notice of disapproval the applicant may apply in writing to be heard by the supervisor, or his authorized agent, in support of his application. In view of the specific requirement of the Federal Alcohol Administration Act that the applicant be afforded due notice and opportunity for hearing on the application, in advance of adverse action thereon, the procedure resorted to in connection with the issuance of industrial alcohol permits is modified in the case of beverage permits to the extent indicated.

Should application be made for a hearing, the district supervisor notifies the applicant of the time and place of hearing, which must be held within thirty days after receipt of the request, unless continued for cause. At all hearings upon permit applications the applicant is required to assume the burden of proof in establishing his fitness for a permit, and must go forward with his case in advance of the introduction of any testimony by the district supervisor or his representative.[70] The Deputy Commissioner in charge of the Alcohol Tax Unit, or the district supervisor in charge of the field office, designates in writing some official or employee as hearing officer, to hold and conduct hearings upon permit applications and upon proceedings to suspend, annul or revoke permits. These appointments are usually general in nature and are not made, except in special instances, to cover individual proceedings. All notices of contemplated denial of beverage permits, and all orders to show cause why beverage or industrial permits should not be suspended or revoked, are signed by the district supervisor. The citation, in revocation, suspension or annulment cases, must contain a statement of the acts charged as having been committed by the permittee and constituting the grounds upon which the proceedings are based.

In cases involving applications for beverage permits under the Federal Alcohol Administration Act the notice of contemplated denial must contain a statement of the grounds upon which the supervisor intends to rely in acting adversely upon the permit application. Service of the citation is made by mailing a copy thereof to the applicant or permittee, as the case may be, by registered mail or by having the same served personally by an agent or inspector of the Alcohol Tax Unit. A certificate of mailing and the registry return card, or certificate of the officer making personal service, must be filed as a part of the record in the case. In cases involving revocations of industrial alcohol permits the hearing must be held within fifty miles of the place where the acts constituting the violation are alleged to have occurred. Although this requirement is not made specifically applicable to hearings involving permits under the Federal Alcohol Administration Act, it is likely that the same requirement will be made applicable to such hearings, in view of the decentralization of the permit system and the vesting of authority in district supervisors to issue, suspend, annul and revoke such permits. After the service of a citation the permittee may, if he desires, file a stipulation with the designated hearing officer waiving the taking of evidence on the charges contained in the citation and agreeing that an order be entered denying, suspending, annulling or revoking the permit, as the case may be.

[70] For a discussion of this procedure see Yudelson v. Andrews, 25 F. (2d) 80 (C. C. A. 3d, 1928); Chicago Grain Products Co. v. Mellon, 14 F. (2d) 362 (C. C. A. 7th, 1936).

The evidence introduced at the hearing, either on behalf of the Government or the respondent, may consist of affidavits, depositions, duly authenticated copies of records and documents, and oral testimony of witnesses. However, affidavits may not be used if the personal attendance of the affiant as a witness is reasonably possible, and such a showing must be made in advance of the admission of the affidavit in evidence. When it appears that the personal attendance of the witness is not reasonably possible, or that the witness will not execute an affidavit or sign a written statement, the official report of the agent or inspector, showing the substance of the information conveyed to him by the absent witness, may be introduced in evidence upon identification by the agent or inspector.[71] Unless waived by both parties, a stenographic record is made of the testimony and proceedings, including stipulations and admissions of fact but not arguments of counsel. A transcript of the proceedings must be made in all cases where liability for taxes are involved, and in all cases where desired by the respondent for use in court proceedings to review the supervisor's action. In cases where the representatives of the government and the respondent agree upon a summary narrative of the testimony in lieu of the report thereof, the summary narrative is reduced to writing and has the same force and effect as if the testimony were reported in detail.

At the conclusion of the testimony the hearing officer may hear arguments of counsel and may limit the time of such arguments at his discretion, and may also allow briefs to be filed on behalf of either party and may fix a time within which the same may be filed. Within a reasonable time after the conclusion of the hearing, the hearing officer must render written findings of fact, stating the issues of fact involved in the hearing, his conclusions thereon from the evidence adduced, and a summary of the evidence offered by both parties. Such findings, together with the transcript of the record, are forwarded to the district supervisor for review and action. Prior to July 1, 1940, under regulations then in effect governing hearings under the Federal Alcohol Administration Act, a copy of the hearing officer's report was required to be served upon the respondent or his representative, and provision was made for the filing of written exceptions to the hearing officer's report within ten days after service. On the basis of these exceptions, oral arguments were had before the Administrator,

[71] The Comptroller General ruled November 29, 1924 (4 Comp. Gen. Op. 499), "Answering the specific question presented I have to advise that there appears to be no authority of law for the payment of expenses incident to securing the attendance of witnesses at hearings conducted by the Bureau of Internal Revenue for the purpose of determining whether permits issued under the National Prohibition Act should be revoked or reduced." Industrial alcohol permits were issued under the National Prohibition Act, and the substance of the National Prohibition Act permit requirements, in respect to industrial alcohol, was carried forward in §6 of the Liquor Law Repeal and Enforcement Act which appears as §3114(a) of the Internal Revenue Code. In Meinwald v. Doran, 60 F. (2d) 261 (E. D. N. Y. 1932) the Court said, "Congress has failed to provide subpoena powers, and therefore the hearings are placed in the same category as other administrative hearings under other laws, in which, where the personal attendance of witnesses cannot be procured, secondary evidence may be received." See also Ossam v. Moss, 44 F. (2d) 845 (E. D. N. Y. 1930); Doran v. Kaier, 60 F. (2d) 259 (C. C. A. 3d, 1932). The applicability of this procedure to permits under the Federal Alcohol Administration Act is doubtful, in view of the fact that §9 of the Federal Trade Commission Act (38 STAT. 772 [1914], 15 U. S. C. §49), which gives the power to require by subpoena the attendance and testimony of witnesses, is made available by Congress to enforce the Federal Alcohol Administration Act (27 U. S. C. §202(g)).

who was then charged under the statute with the responsibility for issuing and revoking permits, and final action by him in the proceedings was deferred until the conclusion of the argument. This procedure has now been dispensed with. Upon receipt of the hearing officer's report, the district supervisor reviews the record and acts thereon in accordance with his best judgment, either disapproving the permit application or revoking, suspending, or annulling the basic permit, as the case may be, or dismissing the proceedings if warranted. If the supervisor does not concur in the findings or conclusions of the hearing officer, after consideration of the record of the evidence taken at the hearing, he must make such findings and order as in his opinion are warranted by the law and the facts in the case. A copy of the order of the supervisor and of his findings of fact, if any, are forwarded to the respondent or his attorney of record in the proceedings.

Within twenty days after service of the order the respondent may file an application with the supervisor for a reconsideration of the order, on the ground that it is contrary to law, or not supported by the evidence, or because of newly discovered evidence which the respondent, with due diligence, was unable to produce at the hearing. The supervisor may hear the application personally on a day fixed by him, or refer it for hearing to a board of review, consisting of not more than three persons designated by him. Following such review the supervisor may either affirm or modify the order previously made, or may vacate and set aside the order and dismiss the proceedings, or order a new hearing. After final order by the supervisor, and in order to insure uniformity of administrative action, the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit, may, in his discretion, entertain an appeal from the supervisor's order, if filed within ten days from the date of the order. The petition for review must set forth facts tending to show action of an arbitrary nature, or a proceeding and action contrary to law and regulation.

Two modes of review by the courts are provided for, one applicable to industrial alcohol permits, and the other applicable to beverage permits issued under the Federal Alcohol Administration Act. In cases involving industrial alcohol permits, the applicant or permittee, in the event of disapproval of the permit application, or the revocation of a permit by the district supervisor, or Deputy Commissioner, may have a review of the decision in the United States district courts. The court upon such review may affirm, modify or reverse, as the facts and the law in the case may warrant.[72] In cases involving permits under the Federal Alcohol Administration Act appeals from orders denying, suspending, revoking or annulling permits may be taken by filing an appropriate petition in a circuit court of appeals.[73]

The procedure followed by the district supervisors in issuing, suspending and revoking permits for the manufacture, storage, procurement and transportation of bottles, designed or intended for use in the sale at retail of distilled spirits, is substantially the same as the procedure applicable to other permits issued under the internal revenue laws and the Federal Alcohol Administration Act. There is, however, no

[72] I. R. C. §3114(a), (b), (c).

[73] Procedure discussed *supra* p. 576.

provision made by statute for a review of the supervisor's or Deputy Commissioner's action in denying, suspending or revoking such permits.

Promulgation of Regulations

The rule-making powers of the Treasury Department with respect to liquor are perhaps more extensive than in any other field of government activity, because the liquor industry, from the revenue as well as the social standpoint, is the most thoroughly regulated and carefully supervised of all the industries. All needful procedure governing the details of operation cannot be spelled out in acts of Congress, with the result that the executive branch is vested with broad regulatory powers. In the exercise of these powers it is pertinent to note that Congress, with one exception, has never seen fit to require that liquor regulations be made the subject of public hearings, or that the regulations prescribed be subject to judicial review. The exception is the Federal Alcohol Administration Act, which deals with the regulation of trade practices, as distinguished from revenue collection. This act requires that reasonable public notice and opportunity for hearing be afforded to interested persons prior to prescribing any regulations governing labeling, advertising or trade practices, thus following a modern trend also evidenced in recent acts of Congress, such as the Fair Labor Standards Act,[74] the Bituminous Coal Act of 1937[75] and the Food, Drug and Cosmetic Act.[76] The Federal Alcohol Administration Act, however, makes no provision for judicial review of regulations issued after public hearing.

Although the Alcohol Tax Unit has not undertaken to promulgate any labeling, advertising or trade practice regulations since it became charged with enforcing the Federal Alcohol Administration Act, it is assumed that the procedure to be followed in drafting such regulations and in holding public hearings thereon will follow closely the procedure heretofore followed by the Federal Alcohol Administration. Notice of public hearing upon proposed regulations has usually been given to parties in interest at least thirty days in advance of the hearing. No attempt is made in the notice of hearing to paraphrase the exact language of the regulation that is proposed to be adopted. The proposed regulation is described in the hearing notice in general terms, with stress upon the ultimate objective rather than phraseology. Notice of the hearing is published in the *Federal Register,* and copies thereof are also mimeographed and distributed to members of the industry who, because of the nature of their business, are thought to be interested in the subject matter. Hearings are conducted informally, in much the same manner as legislative hearings before Congressional committees. Parties desiring to be heard are permitted to read prepared statements and file for the record any statistical material or other written matter which may have a bearing on the subject. Witnesses are not sworn nor permitted to be cross-examined by parties at the hearing whose views are in conflict with those expressed by the witness. However, all witnesses are ordinarily examined at length by the government officers conducting the hearing. After the close of the hearing

[74] 52 STAT. 1060, 29 U. S. C. §§151 *et seq.* (1938).
[75] 50 STAT. 72, 15 U. S. C. §829 (1937).
[76] 52 STAT. 1040, 21 U. S. C. §§301 *et seq.* (1938).

opportunity is afforded to file briefs within a specified period, usually thirty days. The briefs so filed are studied in conjunction with the stenographic transcript of the hearing record, and digests of the testimony, exhibits and briefs are prepared for purposes of convenience. As to all future regulations promulgated under the Federal Alcohol Administration Act the Deputy Commissioner of Internal Revenue, with the approval of the Commissioner of Internal Revenue and the Secretary of the Treasury, will determine the course of action to pursue, and following such determination, will promulgate regulations with the approval of the Commissioner and Secretary. All regulations are published in the *Federal Register* and copies thereof mailed to parties in interest and permit holders affected thereby. The policy is generally pursued, in connection with changes in existing regulations, of making the effective date of amendments sufficiently in advance to allow for trade adjustments.

In promulgating regulations under the internal revenue laws the staff of the Deputy Commissioner in charge of the Alcohol Tax Unit, including officers in the field, occasionally encounters weaknesses in existing regulations, and where such weaknesses are discovered appropriate amendatory regulations are issued. As new acts are passed by Congress it becomes necessary to issue regulations to carry the provisions of the new law into effect, and amendments to existing regulations to bring the same into conformity with the procedure made necessary by new legislation. In all of these matters the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit, upon determining the course of action to pursue, submits necessary regulations to the Commissioner of Internal Revenue and the Secretary of the Treasury for approval before promulgation. Although it is not necessary under the law to afford to interested parties any opportunity for public hearing in advance of prescribing internal revenue regulations, the custom is sometimes pursued of submitting drafts of proposed regulations, informally, for criticism of industry members or their representatives. This is usually accomplished by soliciting the viewpoints of officials and attorneys for existing trade associations in the beer, wine or spirits field.

IMPORTS AND EXPORTS

The duties of the Treasury Department Bureau of Customs, with respect to the importation of liquor, are merely incidental to the broad functions of the Bureau in controlling the entry of foreign merchandise into the United States. The procedure applicable to liquor imports differs from the procedure applicable to other commodities, only to the extent that restrictions imposed by law on the importation of liquor are not imposed on other commodities. For example, in the case of alcoholic beverages the importer is required to hold a permit under the Federal Alcohol Administration Act to engage in the business of importing. Consequently customs authorities will not permit beverage liquor, imported for sale or other commercial purposes, to be entered into customs for domestic consumption unless the person seeking to make the entry holds the necessary permit. All restrictions domestically imposed with respect to the labeling, marking, stamping, and size and fill of liquor containers are made equally applicable to imported liquors. Customs officers at the

various ports of entry must therefore be satisfied before releasing liquor from customs custody that these requirements are met. All imported distilled spirits in containers of ½ pint up to one gallon must be packaged in liquor bottles which have blown therein the required indicia; internal revenue strip stamps, unless affixed by the exporter abroad, under regulations authorizing the same, must be attached to each bottle while in customs custody; restrictions against the importation of empty liquor bottles must be enforced; certificates of origin executed by foreign government officials must be presented to vouch for the genuineness of French Cognac and Scotch, Irish and Canadian whisky; similar certificates must be presented to cover importations of whisky of American type; statement of age appearing upon the labels of imported whiskies, brandies and rums must be authenticated by foreign government certificates as to age accompanying each importation; the invoices covering liquor shipments from abroad must be certified by American consular officers in the same manner as invoices covering shipments of other merchandise; distilled spirits in bulk containers may not be released except to authorized receivers; the internal revenue tax and customs duties must be collected and deposited.[77]

In addition to enforcing the restrictions applicable to commercial shipments of liquor, customs collectors control importations of liquor in the baggage of incoming nonresidents, and residents of the United States returning from abroad. Although provision is made for the free entry of property up to $100.00 in value in the possession of returning residents, there may not be included in such exempt property more than one gallon of alcoholic beverages. Adult nonresidents are allowed exemption only on one quart of alcoholic beverages.

Congress makes provision for the exportation of alcoholic beverages, free of tax, under regulations requiring close supervision by the Alcohol Tax Unit of the Bureau of Internal Revenue, and by the Customs Bureau.[78] All distilled spirits, wine and malt beverages withdrawn free of tax for export, after being marked and branded in a distinguishing manner, are passed through the collector of customs at the port of exportation.[79] The exporter is required to give bond to insure that the product after exportation will not be relanded in the United States. Provision is also made for the exportation of distilled spirits and wines, upon which the internal revenue tax has been paid, if bottled under supervision especially for export, with provision for refund of the tax upon proof of landing in a foreign port.

[77] The prevailing rates of duty on alcoholic beverage imports, which, except in the case of beer, are in addition to the internal revenue taxes, are: whiskey less than four years old $5.00 per proof gallon; whiskey four years or more old $2.50 per proof gallon; beer 50 cents a gallon; rum imported in containers of more than one gallon $5.00 per proof gallon; rum imported in containers of one gallon or less $2.50 per proof gallon; gin, brandy, cordials, liqueurs and bitters $2.50 per proof gallon; champagne and other sparkling wine $3.00 a gallon; vermouth, and still wines of 14% or less alcohol, in containers of more than 1 gallon $1.25 per gallon; still grape wines of 14% or less alcohol in containers of 1 gallon or less 75 cents per gallon; vermouth in containers of 1 gallon or less $.62½ per gallon; wines over 14% alcohol $1.25 a gallon. All these rates are reduced 20% on products of Cuba. In the case of distilled spirits imported at less than 100 proof, the same duty is collected as for 100 proof spirits.

[78] I. R. C. §§2885, 3037, and 3151.

[79] According to the Bureau of Foreign and Domestic Commerce there were imported into the United States during 1939: 11,422,404 proof gallons of distilled spirits, 3,936,899 gallons of wine, and 1,984,272 gallons of beer. During the same period there were exported from the United States: 284,432 proof gallons of distilled spirits, 86,519 gallons of wine, and 708,552 gallons of beer.

STATE ADMINISTRATIVE MACHINERY FOR LIQUOR CONTROL

George A. Shipman*

As long ago as 1904, Ernst Freund wrote with respect to the regulation of the sale of alcoholic beverages, "There is hardly any other branch of law in which there has been so much shifting and reversing of policies."[1] This statement, intended as a summary of prior experience, proved to be prophetic of the years ahead. During Prohibition, regulatory policies assumed a superficial uniformity, but beneath the surface of constitutional restraint there developed the widest variety of local practices. These ranged from rigid suppression to easy toleration of an extra-legal liquor trade. In a sense local values could not be "repealed" by the adoption of Prohibition. In widespread areas an entirely new traffic in alcoholic beverages developed often dominated by professional criminals and accepted by otherwise law-abiding citizens as an unwelcome but necessary evil. Enforcement policies continued to fluctuate, more rapidly than in pre-Prohibition days, since there was no longer the stabilizing force of formalized toleration and official supervision. From many standpoints Repeal meant a return to legal rule and defined discretion.

State Problems After Repeal

In a legal sense Repeal meant the abandonment of rigid national control and a return to state regulation protected by the terms of the Twenty-first Amendment, which were reminiscent of the provisions of the Webb-Kenyon Act of 1913.[2] Within each state there were rather definite ideas of what future action should be like, colored in large part by what was understood to be the lessons of the past 15 years. It would not be feasible to attempt a complete presentation of the great variety of viewpoints held in the several localities. However, so far as they expressed a resolution to accomplish a more effective public control, these attitudes were certainly important:[3]

1. The legalization of the liquor business was intended to stamp out the illicit trade in all of its wide-reaching ramifications from "rum-row" off the sea coast to the distiller of "corn" in a lonely mountain hollow.

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[1] Freund, The Police Power (1904) 194, n. 2. [2] 37 Stat. 699.

[3] In this connection see Harrison and Laine, After Repeal (1936) 1-6.

2. The saloon—the corner drinking place—was not to return.

3. Since light beer and wines, defined generally as containing not more than 3.2 percent of alcohol by weight, were "non-intoxicating," their use was to be encouraged as a satisfying substitute for high-proof distilled spirits.[4]

4. Severe restrictions were to be placed upon operators in the liquor business to bar the return of a "whiskey trust," "tied houses" and other interlocking ownerships centralizing the profit motive but obscuring the responsibility for the conduct of retail business.

5. Dry areas were to be protected. Local districts desiring to remain "bone-dry" were to be guaranteed the privilege of local option.

The objectives of Repeal found a variety of expressions in state legislation. It would be hazardous to conclude that standard forms of control developed. From state to state different combinations of devices added up to quite different patterns of control. A few dominating characteristics stood out. In contrast to pre-Prohibition regulation, Repeal legislation emphasized a far greater degree of state control; broad discretion was granted to state administrative agencies to assure the ends of regulation; and for the first time proprietary action in the form of a state liquor monopoly was developed on a broad scale. All of these efforts are proving to be of the utmost significance, and they may provide the proving ground for regulatory methods that will find application elsewhere in the state control of economic activity.[5]

In retrospect it seemed that the major share of trouble caused by the sale of alcoholic liquors was occasioned by the public drinking place, an institution which was as much a local social center of dubious character as a dispensary of intoxicating beverages. That firm resolve that the saloon should not return takes concrete legislative form in the separation of "package" from "on-premise" sale.[6] "On-premise" sale is further limited in a number of states to *bona fide* restaurants and hotels.[7] These restrictions express a purpose that alcoholic beverages may be sold as

[4] The separate treatment of "3.2 beer" began with the enactment on Mar. 22, 1933 of a law (48 STAT. 16), which imposed a special tax upon beer and liquor containing one-half percent or more but not more than 3.2 percent of alcohol by volume. Such beverages were exempted from the operation of the National Prohibition Act.

[5] In all, 45 of the 48 states have legalized the sale of alcoholic beverages in one degree or another. Kansas, Mississippi and Oklahoma are "dry" but all have legalized the sale of "3.2" beer.

For the primary features of various state systems, see CULVER AND THOMAS, STATE LIQUOR CONTROL ADMINISTRATION, A STATUTORY ANALYSIS (1940). They report (20-21) that 28 of the 45 wet states permit private sale of alcoholic beverages under state or local license. Seventeen states use the public monopoly for retail sale of distilled spirits. In seven of the license states control is centralized in the state government (Cal., Del., Conn., Ind., N. Y., S. C., Tex.). In New York and Texas the state agency is advised by local authorities but the power of decision is reserved to the state. In all of the monopoly states, except North Carolina, the operation of the monopoly is a state responsibility. In North Carolina, sale is permitted in those counties adopting the state store system by referendum. The county operates the liquor stores. Wisconsin and Minnesota authorize municipalities to operate local package stores. The Delaware Liquor Commission is authorized to operate a monopoly of retail sale of distilled spirits or to license private package stores. The latter method has been followed. In Wyoming, the monopoly applies to wholesale rather than retail business.

[6] "On-premise" sale of high proof liquors is prohibited in Arkansas, South Carolina and Texas among the license states. Of the monopoly states, nine (Idaho, Iowa, Mont., N. C., Ore., Utah, Va., Wash., W. Va.) prohibit such sales by the drink. For statutory provisions as of 1935, see HARRISON AND LAINE, AFTER REPEAL (1936) Appendix IV, *Digest of State Liquor-Control Systems*, 231-248.

[7] *Id.* 63. Only nine license states issued "on-premise" licenses to premises approximating the old saloon. It appears that the monopoly states permitting sale by the drink restrict such sales to hotels,

an incident to the serving of food, not as the primary object of the business establishment. More or less elaborate restrictions are placed upon the place where liquor is sold. These also vary considerably from state to state. In broad outlines they are aimed at the control of place location with respect to schools and churches, the maintenance of sanitary conditions, the limitation of the number of licensed places, and the maintenance of orderly conduct on the premises.[8] Various states show interesting combinations of statutory rule and administrative discretion at these points of control.[9]

Due partially to a rather impatient demand for an early legal sale of alcoholic beverages, light beer and wines were declared to be legally "non-intoxicating," and in a number of states the sale of such beverages was legalized prior to the repeal of national and state prohibition. In some jurisdictions this separation of treatment has continued, based upon the assumption that the easy availability of low-proof and comparatively inexpensive drinks would soften the demand for the sale of high-proof and higher priced distilled spirits. In none of the monopoly states, for example, are light beer and wines included within the public monopoly, and in states where "on-premise" sale of distilled spirits is forbidden, beer may often be purchased by the glass at the corner drug store.[10] For that matter, the sale of beer is seldom included in the "dry-area" restriction that may be assumed by local option.

Patterns of State Control

Three different types of emphasis are discernible in the activities of various state agencies concerned with liquor law administration. In general terms these represent primary concerns for revenue collection; for regulatory control through the use of enabling powers in the first instance and directing powers in the second;[10a] and for the proprietary operation of a state monopoly of spirituous liquors.

restaurants and clubs. *Id.* 148-149. In the administration of the "on-premise" restrictions to *bona fide* eating places, lax supervision can readily permit the eating place requirement to degenerate to a symbolic compliance.

[8] No satisfactory compilation of statutory provisions has been discovered. CULVER AND THOMAS, *op. cit. supra* note 5, at 49, state that, of the 45 wet states, the state administrative agency controls hours of sale in 38; the location of licensed premises in 36; advertising in 35; the number of licensed places in 16; and the physical characteristics of licensed places in 27. Interesting examples of administrative regulations are Ohio, Dept. of Liquor Control, Reg. 51; New Jersey, Dept. of Alcoholic Beverage Control, Regs. 20 and 21; and Washington, State Liquor Control Bd., Rules and Regulations, tit. II.

[9] In connection with the exercise of regulatory discretion, see the broad grant to restrict amounts of purchases in IOWA LIQUOR CONTROL ACT §8(h), IOWA CODE (1939) tit. VI, c. 93, and the regulation adopted by the Iowa Liquor Control Commission, Nov. 20, 1935, authorizing store managers to restrict the amount and the kind of liquor to be purchased by any purchaser. See also the authority granted to the New Jersey Commission of Alcoholic Beverage Control, N. J. REV. STAT. (1937) 33: 1-39, and the regulations issued thereunder, particularly Nos. 20 and 21 covering the conduct of licensees, the use of licensed premises, equipment, signs and advertising matter.

[10] "Non-intoxicating beer" may be purchased for on-premise consumption apparently everywhere in the United States, unless prohibited by local ordinance. In six monopoly states (Idaho, Iowa, N. C., Utah, Va., W. Va.) the sale of beer is not supervised by the state administrative agency operating the monopoly but by the state revenue department.

[10a] The use of the terms "enabling powers" and "directing powers" follows Freund. See ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) c. 4. Enabling powers impose conditions precedent to a course of action. Their exercise by the granting of licenses, permits and similar authorizations enables

The first type, with the primarily revenue emphasis, often incorporates liquor control into the existing state agency for tax administration. In these instances, the enforcement of law against licensees is often a state concern, but the suppression of illegal sale is left to local police. The selection of licensees, within the limits of state restrictions, is likewise a local responsibility. In consequence deliberative functions at the state level are minimized in importance, and the form of the administrative agency is often that of a single administrator.[11]

In states placing a primary emphasis on regulatory control, taxes other than license fees may even be collected by an entirely separate department.[12] The foremost task of the state agency is that of administrative regulation. In consequence importance is attached to such activities as the granting of licenses, the supervision of licensees, the exercise of discretionary directing powers in controlling the conduct of liquor sale, the investigation of complaints, the holding of formal hearings, the hearing of appeals from local action with respect to licensees or applicants for licenses, and the revocation or suspension of licenses. The organization of the state agency often reflects these deliberative and discretionary duties in multi-membered boards, and, in instances, the separation of administrative and deliberative functions.[13]

The monopoly states show further distinctive administrative characteristics. In each case deliberative functions bulk larger in the combination of proprietary management and regulatory control. The result is the use, in each of the monopoly states, of a multi-membered executive, alike in the emphasis of organization but differing substantially in the internal distribution of function and authority. In no instance, however, does the proprietary element stand alone. The dominating desire for effective regulation brings a parallel control over the licensing of "on-premise" sale, package stores supplementing state outlets, manufacturers, transporters, and venders

the person found qualified to proceed, but a person not so authorized is prohibited altogether from acting. Directing powers intervene in an authorized course of action to prevent abuses of the privilege. They are applied through administrative rules and orders, and may assume the external characteristics of a quasi-legislative or quasi-judicial method, or both. Thus through the enabling power, a person is licensed to operate a package store, but the continued exercise of the privilege is subject to regulation, beyond the scope of the conditions precedent, to prevent undesirable merchandising practices.

[11] For present purposes, "revenue" emphasis is used to designate the institutionalization of liquor administration around existing state revenue collection. All of the states falling in this category are "license" states. States using the proprietary method, whether locally intended chiefly for profits or for control, are separately classified as "monopoly" states. Of the 28 license states, 12 have placed liquor administration in revenue collection agencies. In eight of these states the issuance and revocation of licenses appears to be either administered by local authorities or conditioned upon local approval or complaint. In nine of these states, law enforcement is vested primarily in regular police officers. Under these circumstances the state function tends to be concerned primarily with special matters. See Culver and Thomas, *op. cit. supra* note 5, at 54-63.

[12] In five of the license states (Conn., Ill., Mass., N. J., N. Y.) tax collection (other than license fees) is placed in the state revenue agency. It should be noticed that Massachusetts, New Jersey and New York represent the largest and in some respects the most difficult tasks of administrative regulation in the country. Culver and Thomas, *op. cit. supra* note 5, at 35.

[13] There are 16 states that fall into this category. Seven use multi-membered agencies—three members in Conn., Ill., Mass., Neb. and Tex.; four members in Ind.; and five members in N. Y. For a classification of powers, see Culver and Thomas, *op. cit. supra* note 5, at 50-52.

of malt beverages. In some instances broad powers of law enforcement are also conferred upon the monopoly.[14]

The broad classifications of revenue administration, licensing control and public monopoly only designate the primary emphasis of state, as distinct from local, effort. In each instance the complete pattern of control must necessarily embrace all restraint and supervision imposed at every jurisdictional level within the state. Where, moreover, wide discretion as to the emphasis of action is left to the local community, a confusing diversity of practice can result. The term "monopoly," furthermore, identifies only the major characteristic of regulation in the states using the proprietary method. The monopoly does not exclude the use of regulatory licenses as to those phases of the liquor business that do not require the same extremity of restraint. Except for the retail sale of distilled spirits, the liquor industry is controlled with few exceptions by the licensing method.

Within the general patterns of state regulation there exists the widest range of individual differences in method and emphasis. Perhaps the most significant feature, common to most of these varying systems, is that few are based upon rigid statutory provisions. For the most part, the statutory rule is stated in general terms and leaves to administrative discretion the intricate task of fitting detailed restrictions to the practices of the regulated industry. There results a fringe of experimental restraint built primarily with administrative powers. At this front line of public regulation, the ebb and flow of changing policy is most likely to appear. As public values change or pressures accumulate in the regulated industry, the point of first impact is apt to be the administrator's office from which detailed regulations and instructions issue. In consequence it seems not unlikely that the shifting and turning of policy that Freund noticed throughout the history of liquor regulation, if continued, will be located in the future at the level of administrative legislation where changing pressures can be absorbed without the formality of statutory amendment.[15] This more

[14] Sixteen states operate a state monopoly of retail package sale (Ala., Idaho, Iowa, Me., Mich., Mont., N. H., N. C., Ohio, Ore., Pa., Utah, Vt., Va., Wash., W. Va.). Wyoming's monopoly is of wholesale sale. The Delaware department is authorized to operate either a monopoly or licensing system. The latter alternative has been used but orders are placed by retailers through the state department. Each of the state agencies uses a multi-membered board of three members except in Ohio (four) and in Wyoming (five). Michigan and Wyoming boards include elective state officers as *ex officio* members. See CULVER AND THOMAS, *op. cit supra* note 5, at 22-24.

[15] In this connection it is interesting to consider the entire footnote of Freund, *supra* note 1: "The history and present operation of liquor legislation reveals also very clearly the practical limits of the police power; the futility of extreme measures antagonizing the habits of many people and the demoralization incident to the administration of unenforceable laws. There is hardly any other branch of law in which there has been so much shifting and reversing of policies. All forms and methods of governmental power have been tried, and have as a rule been found successful in the inverse order of their incisiveness. Prohibition is the least efficient policy; restrictive regulation with discretionary powers is less efficient than restrictive regulation without discretionary powers; governmental regulation is not as efficient as social pressure, social pressure is not as efficient as the slow education of public sentiment, and nothing is so efficient as the supplanting of the attractions of drink and of the saloon by providing other sources and forms of rational pressure." *Op. cit. supra* note 1 at 193-194, n. 2. Freund's reference to discretionary powers was in terms of local control since the use of well-developed state regulatory powers had not yet come about. There is some evidence that the broader base of administrative regulation at the state level,

flexible method of regulation may in the long run produce a better stabilized and on the whole more effective public control.

The Licensing Method

The use of enabling power as a method for the regulation and restraint of the liquor business has a long historical background.[16] In mechanics the device is exceedingly simple. The doing of business without the authority of a license or permit is expressly forbidden and is a crime. Licenses or permits are issued for limited periods, ordinarily one year, and are not automatically renewed. Such restrictions as seem appropriate are attached usually by statute as conditions precedent to application for the license or permit and others of a more discretionary nature as conditions of the continued enjoyment of the privilege. Such conditions may relate both to the person applying, and to the place where the license is to be exercised.[17] In addition, the number of licensees may be limited directly by a ratio to population in the local jurisdiction, or indirectly by a high license fee. The list of licensees furnishes a directory for inspection and investigation, defines the regulated group, and lays the groundwork for continuing supervision. Enforcement is accomplished by the revocation of the license, a suspension for a period of time, or by a refusal to renew after the expiration of the license term.

In terms of administrative mechanics the use of enabling powers calls for a process using a deliberative method but equipped with a specialized field force policing the regulated group. Where broad statutory discretion permits the administrative imposition of terms and conditions upon licensees, a deliberative method is required for the setting up of standards. In any case a decision must be made as to whether the license shall or shall not be granted, whether a license should be renewed, and whether administrative penalties should be imposed and, if so, of what severity. Auxiliary to these functions may be policing, accounting, clerical and routine legal operations.

Of the 28 states using the licensing method of alcoholic beverage control, eight were chosen for special analysis.[18] These were selected as representative of the principal types of administrative organization, regulatory method and distribution of authority between state and local authorities. In addition they reflect work loads of from some 462 licenses and permits in Delaware to 72,655 of all kinds in New York state.[19] Their total population aggregates approximately 40 million persons.

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with a specialized agency and developing technical procedures, may provide a more effective method of control.

[16] For the best discussion of enabling powers see Freund, *op. cit. supra* note 10[a], at 104-139, 491-498.

[17] For an excellent illustration of these conditions in statutory form, see N. Y. Alc. Bev. Cont. Law, art. 4, §§54, 55; art. 5, §§63, 64; art. 8, §§100 *et seq.* These are explained *infra* p. 610.

[18] The states analyzed are Cal., Del., Ind., Mass., N. J., N. Y., Tex., Wis.

[19] Delaware as of Dec. 1, 1939, Del. Liq. Cont. Comm., Rep. (1939) pt. II, 3. New York, issued during 1939, N. Y. Alc. Bev. Auth., Rep. (1939) 16-17.

Characteristics of Licensing Agency

The states selected for analysis show an impressive diversity in administrative characteristics. In California control is entirely centralized in the state to the exclusion of all local action including the privilege of local option.[20] Wisconsin, on the contrary, leaves the licensing and regulation of the retail sale of liquor to local authorities. The state performs only revenue collecting operations.[21] Between these extremes are many intermediate stages. In New Jersey, a separate and essentially independent administrative establishment was created headed by an administrator named in the statute, while in California the function of liquor control was delegated to the popularly elected State Board of Equalization. In Delaware in the terms of the statute the "... Commission shall consist of only one (1) member...."[22] New York is at the other end of the scale with a five-member authority.

A closer examination of the internal organization of state liquor agencies reveals a number of interesting adaptations. The Wisconsin statute specifies the method of control but merely provides that certain types of licenses shall be obtained from the state treasurer.[23] The exercise of this power of the state treasurer was placed by him in a beverage tax division of his office which was subsequently, in 1938, transferred to the Wisconsin Tax Commission where the division became a unit within the Excise Division of the commission. Inspection and enforcement operations were separated from the beverage tax unit and assigned to a departmental inspection and enforcement bureau.[24] Under its present authority and organization, state liquor control in Wisconsin thus appears to be a comparatively subsidiary interest of a large administrative agency. Revenue collection and enforcement seems to dominate the state's effort.

In California state control was also placed in a state fiscal agency, the State Board of Equalization, where it became only one of seven major concerns. The state constitutional amendment, however, centralized all control powers at the state level.[25] It appears that the State Board of Equalization has not exercised its powers with a restrictive emphasis; that board members have divided up the area of the state for individual control; and that widespread dissatisfaction has accumulated. Late in 1939 two members of the board were indicted as the result of a grand-jury investigation of a reported liquor license racket.[26]

[20] For an excellent discussion of the California experience, see CULVER AND THOMAS, *op. cit. supra* note 5, at 12-19. The California statute is ALC. BEV. CONT. ACT, Cal. Stats. 1935, c. 330, as amended by Cal. Stats. 1937, c. 758.

[21] WIS. STAT. (1939) c. 176, §§4-14.

[22] DEL. REV. CODE (1935) c. 176, ¶6133, §4(1). N. J. REV. STAT. (1937) tit. 33, §1-3 provides: "The chief executive of the department shall be the state commissioner of alcoholic beverage control. . . . His term shall commence upon the sixth day of December, one thousand nine hundred and thirty-three, and shall terminate on the first day of April, in the year one thousand nine hundred and forty, but he shall serve until his successor has been elected and qualified. His successor shall be elected by a joint session of the legislature for a term of seven years beginning on the first day of April, one thousand nine hundred and forty, and every seven years thereafter. . . . The first state commissioner of alcoholic beverage control shall be D. Frederick Burnett of the village of South Orange, in the county of Essex. . . ."

[23] WIS. STAT. (1939) c. 176, §5.

[24] WIS. TAX COMM., BIEN. REP. (1938) 32-38.

[25] CULVER AND THOMAS, *loc. cit. supra* note 20.

[26] *Ibid.*

Both New York and Massachusetts have created special state agencies for control purposes. In Massachusetts, a three-member commission is a separate state department while in New York the five-member authority is a division of the Executive Department. It appears, however, that the New York authority is to all intents and purposes an independent agency. In neither state is there a statutory indication of a separation of function between the controlling body, its chairman, or between the body and its subordinates. A suggestion that the chairman of the body in each state is expected to perform additional services is found in the Massachusetts provision that he shall receive a salary of $7,500 against $7,000 for the other members; and in New York that he shall receive $12,000 as compared with $7,500 for the other four members.[27]

Texas and Indiana, however, have taken further steps in the separation of administrative functions. Both states use a board for certain purposes. In Texas a three-member board receives a *per diem* of $10 for not to exceed 60 days of each year. An administrator is appointed by the board to serve at its pleasure. He receives an annual salary of $6,000. The statute grants certain powers to the "Board," and others to the "Board or administrator." It is also provided that concurrent powers of the board and administrator shall be exercised as the board may prescribe. The administrator performs his duties under the supervision of the board.[28]

The Indiana agency is a division of the executive department and consists of an excise administrator and an alcoholic beverage commission of three members. The administrator acts as chairman of the commission. All are appointed by the governor who also fixes their compensation at not more than $6,000 a year. The statute grants powers separately to the commission and to the administrator. The former grants or refuses licenses; revokes them; adopts and promulgates regulations; and prescribes procedures to be used by local boards. The latter is executive officer of the commission and administers the alcoholic beverage division.[29]

Interrelation of State and Local Control

Traditionally the licensing of retail liquor establishments rested with local authorities, in some states municipal or county governing bodies and in others the inferior court of record. The prohibition movement, the increased emphasis on state taxation and the demand for centralized and more stringent controls led plausibly to a large state part in the process of control. The combined result of tradition and new pressures have produced many interesting combinations of state and local authority. These range from completely centralized state control; through local advice and consultations, formalized local recommendation, a division of regulatory jurisdiction; to complete local supervision. A few samples will illustrate the types.

California, for example, centralizes all types of control at the state level. Practice, however, has brought about a degree of consultation with local officers before licenses

[27] MASS. GEN. LAWS (1931) c. 138; N. Y. Laws 1934, c. 478, as amended.
[28] TEXAS LIQUOR CONTROL ACT, VERNON'S TEX. STAT. (1936) Penal Code c. 6, art. 666, §12(b).
[29] Ind. Acts 1935, c. 226, as amended by Ind. Acts 1937, c. 197, §6.

are granted. Routine law enforcement is left to local police.[30] Texas makes specific provision for consultation with local officials and requires that the state board give "due consideration" to their recommendations.[31] In Indiana and New York special local authorities have been created. Local control boards in Indiana are composed of three members—a representative of the state commission, a member appointed by the county commissioners and one appointed by the mayor of the largest municipality in the county. Provision is made to assure representation upon the board of municipalities of over 10,000 population when applications relating to premises within such places are considered. Members receive a nominal compensation. The local board is required to investigate applicants for permits and to report upon the propriety of issuance. The function is entirely advisory.[32]

In New York a local alcoholic beverage control board is used in each county except for those within the city of New York. The boards consist of two members—one appointed by the state liquor authority and the other by the county board of supervisors from a list of eligibles submitted by the governing body of the county medical society. A special board for New York City is composed of four members—two appointed by the state authority and two appointed by the mayor on nomination by the executive bodies of the Academy of Medicine, and the Merchants' Association and the Central Trades Labor Council. Members of the New York City board receive an annual salary, but members of county boards are compensated on an annual fee basis. The boards are authorized to recommend the issuance or refusal of retail licenses and the revocation of such licenses; to investigate and take testimony, and, except in New York City, to restrict the hours for retail sale. Provision is made for a staff to serve each local board. All expenses are paid by the state.[33]

Retail licensing in New Jersey is largely administered by local authorities. The local licensing authority determines in the first instance whether the license should be issued. An applicant, or any other person aggrieved by the action of the local board, may appeal to the state commissioner. The local authority may also stipulate the conditions of a license, but these are subject to the commission's approval. Suspension or revocation may also be made by the local body subject to appeal to the state commissioner.[34] Of particular interest is the provision that municipal action limiting the number of licensees or hours of sale may be appealed to the state commissioner who "... after public hearing, may set aside, vacate and repeal the limitation complained of or change, alter, amend or otherwise modify the same."[35]

[30] CULVER AND THOMAS, *op. cit. supra* note 5, at 17, discussing provisions of Cal. Stat. 1937, c. 758.

[31] TEX. LIQ. CONT. ACT, *supra* note 28, §12(a).

[32] LIQUOR CONTROL ACT, Ind. Acts 1935, c. 226 as amended by Ind. Acts 1937, c. 197, §6.

[33] N. Y., ALC. BEV. CONT. LAW (1934) c. 478, art. 3.

[34] In all municipalities under 15,000 population, except in 6th class counties which are Ocean and Cape May, local governing bodies are licensing authorities. In municipalities over 15,000, the governing body may establish a special three-man municipal control board. N. J. REV. STAT. (1937) tit. 33, §§1-5, 1-19. In 6th class counties, licenses are administered by the judge of the court of common pleas. *Id.* tit. 33, §1-21, as amended. In municipalities over 100,000, moreover, having a board of finance, the board may establish a municipal excise commission which exercises local powers of control within the municipality. N. J. Laws 1940, c. 63.

[35] N. J. REV. STAT. (1937) tit. 33, §§1-41.

Under the Massachusetts law, local licensing authorities grant or refuse retail licenses subject to appeal to the state commission. Local disciplinary action is subject to a similar administrative appeal. Local taxpayers may intervene to question local action by filing a "remonstrance" with the commission which is treated as an appeal from the action complained of.[36] Wisconsin stands at the end of the scale in local authority. Under the licensing system used in that state, all authority over retail licensees, with limited exceptions, is exercised by local governing bodies, and appeals from local action are heard by the courts. No administrative appeal is used.[37]

Characteristics of Administrative Authority

The authority granted to licensing agencies in the jurisdictions examined shows further interesting aspects. The draftsmanship of the Texas Liquor Act, as amended, reflects a definite concern for stabilized administrative action. It is provided, for example, that a rule or regulation to which a penalty applies may be adopted by the state board only after published notice and public hearing. At the hearing any interested person is entitled to be heard.[38] After adoption the rule or regulation is published. Disqualifications of applicants for licenses or permits and grounds for the suspension or revocation of licenses, moreover, are specified in detail. The activities authorized by the possession of a license or permit are likewise set out with care.[39]

Indiana legislation requires that the state board shall investigate the fact situation before adopting a rule or regulation and conditions the exercise of the rule-making power upon the reaching of any one of five conclusions of fact. The conditions are so generalized as to be of little apparent value in controlling administrative action.[40]

Of the states examined New Jersey shows the broadest administrative discretion in the state commissioner. That officer is authorized to "make such general rules and regulations and such special rulings and findings as may be necessary for proper regulation. . . ." A list of subjects follows in such general terms as "sales on credit," "out-of-door sales," "use of screens," and "practices unduly designed to increase consumption of alcoholic beverages." An examination of the regulations promulgated reveals a statutory form and detail that is close to legislative treatment in other states.[41]

While the Wisconsin statute uses few administrative restrictions, it contains a unique provision for the banning of retail sale to certain persons. Any person who by excessive drinking exposes his family to want or the local jurisdiction to liability for his care may be banned from purchases for the period of a year by the signing of a statement to that effect by the person's wife, the governing body, or certain other specified local and county officers. The selling of liquor to such a "black-listed" person is a criminal offense.[42]

[36] Mass. Gen. Laws (1931) c. 138, §67.
[37] Wis. Stat. (1939) c. 66, §5; c. 176, §§5(1), 11-12.
[38] Tex. Liq. Cont. Act, *supra* note 28, at §7(a).
[39] *Id.*, §§11, 12, 15.
[40] Liq. Cont. Act, *supra* note 32.
[41] N. J. Rev. Stat. (1937) tit. 33 §1-39. *Cf.* Regulations Nos. 20, 21, 22, 23.
[42] Wis. Stat. (1939) c. 176, §26.

An integrated picture of the operation of the licensing method may be secured by examining the provisions of the New York statute.[42a] In that state a person desiring to operate a business selling alcoholic beverages by the drink will find that standards apply to the place of sale as well as to the vendor. He cannot qualify as an applicant unless he is operating a *bona fide* restaurant, hotel or club. (For the purposes of this illustration the club license will be excluded.) The premises, however, must not be within 200 feet of a building situated on the same street that is used exclusively as a school, church or other place of worship. But this requirement does not apply if the hotel or restaurant premises were used for those purposes prior to December 5, 1933. The applicant must either own the premises or have them under lease for the period of the license. If, however, a license granted to a business at the same premises was revoked during the two years preceding, the applicant runs the risk that the state liquor authority might refuse to grant a new license. If the premises are a restaurant there shall be no curtains or screens preventing a clear view of the interior from the sidewalk, no swinging entrance door, no interior partition obscuring a full interior view, and no entrance to abutting premises. All glass windows, moreover, must be of clear glass.

The applicant himself must be a citizen over 21 years of age and never convicted of a felony. If he was previously a licensee whose license was revoked in the past two years, he is automatically disqualified. If while not a licensee, he was convicted of a violation of the liquor control act during the preceding two years, he is also disqualified. If, moreover, the applicant is a copartnership, all partners must meet the requirements for individual applicants; and if a corporation is applying, all officers of the corporation must be qualified. A manufacturer or wholesaler of alcoholic beverages must not be interested in the business, and the applicant must not be interested in any manufacturing, wholesaling or other retailing business in such liquors.

Application for the license is filed with the local board for the county (unless the premises are within New York City). The forms prescribed by the state authority must be filled out completely and the fee must be paid with the filing of the application. The local board investigates the applicant and the premises and forwards the license application and the fee with its recommendations to the state authority which may either grant or refuse the license. A hearing, if requested, may be held and each body must reach its decision within a 30 days' period. If the authority decides to grant the license, it may require a bond conditioned upon the maintenance of proper conditions on the premises. When the license is received, the proprietor must place it prominently in the premises.

After the business has gotten under way, restrictions apply to sales, employees, premises, and financial operations. No sales may be made to persons under 18, drunkards, or persons intoxicated. Hours of sale are from eight in the morning until

[42a] This material drawn from the following sections of the N. Y. ALC. BEV. CONT. LAW: 54, 64, 65, 99, 100, 101, 101-a, 102, 104-a, 106, 108, 110, 112, 113, 114, 118, 119, 120, 121, 126.

three the next morning (four in New York City) unless the local board fixes earlier closing hours. It is not necessary that food be purchased with liquor. No credit sales are permitted except by hotels to registered guests. The licensee may not sell for consumption off the premises. As to employees, any who handle or serve alcoholic beverages must be over 18 years of age. The licensee shall not knowingly employ any person who has been convicted (unless subsequently pardoned) of carrying illegal weapons, possessing burglar's tools, possessing narcotic drugs, or vagrancy, among other stipulated offenses.

The premises must be maintained in the condition required for the issuance of the license. No signs advertising a particular brand of beverages shall be shown, and no signs whatever, without prior consent of the state authority. No gambling shall be permitted on the premises. The place shall, in addition, be subject to inspection by any authorized officer at any time when open for business.

On the financial side, the licensee shall not accept or extend a loan from or to another licensee. There are stringent restrictions upon his credit with wholesalers and distributors. In addition he must keep the books and other financial records required by the authority.

The state authority may revoke, suspend or cancel the license "for cause," but it is required to revoke if there is a conviction for illegal sale on the premises, a false statement in the application, the license is transferred or assigned, the premises cease to be a *bona fide* restaurant or hotel as the case may be, or for failure to file a required bond or pay the tax.

Opportunity for hearing is given in the administrative proceedings. Judicial review of the revocation may be heard by the supreme court.

Trends in Administrative Action

The analysis of available data provides little basis for the appraisal of state liquor control exercised through the licensing method. It may be significant, however, that in Massachusetts the number of appeals from decisions of local licensing authorities has steadily decreased. Appeals taken from local refusals to license, for example, have fallen from 860 in 1934 to 248 in 1938, and the proportion of appeals sustained has fallen from some 30% in 1934 to about 15% in 1938. Remonstrances filed by local taxpayers numbered 15 in 1934, and dropped to four in 1935. In 1936 and 1937 none was filed while in 1938 one was entered but was dropped before hearing.[48] This trend may well indicate a maturing of the administrative process with its operation increasingly less open to complaint.

The New York authority shows, out of 991 license proceedings in 1939, 340 suspensions, 59 revocations, 298 warnings and 141 charges dismissed. Other proceedings were disposed of by some variety of disciplinary action so that in 552 of the cases considered some punishment was administered. Data on the judicial review of disciplinary action show very few applications for judicial review in proportion to

[48] See Mass. Alc. Bev. Cont. Comm., Ann. Reps. 1934-1938 inc. (Pub. Doc. No. 153).

the total number of actions undertaken.[44] From the disposition of administrative proceedings in Texas it appears that some disciplinary or restrictive action was taken in all but 311 of the 2826 cases heard by the state administrator during 1939.[45]

From these data it appears that regulatory control is at least at work. Whether it is coping with the problems existing in the regulated community depends upon a number of factors that are not within the reach of this inquiry. In the last analysis the standards existing in that community determine the level of public effort which in turn confronts resistance, avoidance and noncompliance. The appropriateness of the administrative mechanism and its procedure for the performance of its work assignment can be determined only by a continuing and exhaustive analysis.

THE MONOPOLY METHOD

From the standpoint of regulatory method the most significant development in post-Repeal liquor control was the establishment in seventeen states of some form of public monopoly of the sale of distilled liquors. This movement was not without precedent among the states, but it seems doubtful that the South Carolina dispensary system or any similar state effort strongly influenced the drafters of new monopoly statutes. More immediate influences were the monopoly system of several Canadian provinces, the Swedish method of control and the deep-seated reluctance to see the liquor business back in private hands, where, it was feared, the profit motive might defeat effective public control. It is of no little significance that the states adopting the monopoly system were either close to the Canadian border—Michigan, Ohio, Vermont, New Hampshire, and Washington, among others—or had been predominantly dry with repeal winning only by comparatively slight margins—as in Virginia, West Virginia, North Carolina and Alabama.[46]

From the administrative standpoint, the monopoly method calls for a unique combination of operating activities. The proprietary function requires all of the mechanism of large scale merchandizing but simplified considerably because sales promotion is neither necessary nor socially desirable, the products sold are standardized and do not require diversified handling, and the strategy of customer appeal in store premises and equipment is unnecessary. Nevertheless there still remain the important responsibilities of large scale stock purchasing, inventory and sales control, personnel supervision and financial management. These requirements are unknown to the licensing method. As administrative powers, they can be classed only as noncoercive with respect to the community. Compulsion is entirely a matter for internal discipline. Coercive powers are used only for the control of the purchaser and his conduct in the state store.

Nature of the Monopoly

The monopoly method applies primarily to the retail sale of distilled spirits. These are the high-proof beverages that are generally assumed to be the primary root of

[44] N. Y. STATE LIQ. AUTH., REP. 1940 (Leg. Doc. No. 50) 83-84.
[45] TEX. LIQ. CONT. BD., REP. (1939) 18-24.
[46] See HARRISON AND LAINE, AFTER REPEAL (1936) 107 *et seq.*

social abuse. Wines and beer are another matter. So-called "non-intoxicating" beverages, however defined in the local jurisdiction, are invariably beyond the monopoly. In most cases all wines and beer are treated in this same way although in some states the monopoly handles "heavy" wines and beers. Not only are such beverages usually viewed as needing less stringent control, but also the problem of handling bulk sales, such as beer by the case, is of considerable moment.[47] Monopoly systems usually include wholesale business in distilled liquors and heavy wines, but this is important only where sale for on-premise consumption is permitted. Wyoming operates a wholesale monopoly only. Several states are authorized to manufacture alcoholic beverages for sale through the store system, and some experimentation has been undertaken in the state bottling of liquors purchased by the barrel and sold under state brands.[48] Such products have never represented a large proportion of sales volume although retail prices are substantially lower than for private brands.

Beyond the limits of the monopoly method are other phases of the liquor business. These include private manufacture for sale outside the state, transportation of alcoholic beverages through or out of the state, the regulation of "on-premise" sale where permitted, and law enforcement. The monopoly method permits an additional control over "on-premise" sale since retailers can be required to purchase all stocks by or through the monopoly thus tending to assure quality, stabilize price and check sales volume. Apart from this added check-rein, manufacture, transportation and sale are regulated in the monopoly states by the same methods found in the license jurisdictions. The issuance of licenses or permits enables approved persons to operate at approved premises. Substantially the same conditions precedent are imposed and subsequent control is applied by the same types of directing power. Enforcement activities are concerned with the behavior of licensees, the operation of unauthorized persons and the protection of the monopoly.

The span of proprietary, regulatory and enforcement activity is coordinated by personnel management, fiscal supervision, the administration of properties and equipment, and special treatment of legal questions. In brief, an adequate monopoly system calls for a well-developed administrative organization in which the operations of business management, rule-making and administrative adjudication are all important. The breadth of these responsibilities has some tendency toward a division of internal operations making coordination difficult and complicating the task of executive direction.[49]

For present purposes the operation of monopoly systems was examined by sampling seven of the seventeen states using that method of control—Pennsylvania, Vir-

[47] The Ohio monopoly system applies only to "spirituous liquors" defined as containing not more than 7% alcohol by weight or 21% alcohol by volume. Liquor Control Act, Ohio Gen. Code (1938) §6064(1). Beer and wine are excluded by Michigan. Liquor Control Law §3, Comp. Laws Mich. (Mason's Supp. 1940) §9209 (16-73a). The West Virginia monopoly includes all beverages containing more than 5% alcohol by weight. W. Va. Code (1937) c. 60, §5907 (60, 61, 65, 67). No beer is stocked by state stores in West Virginia.

[48] Washington, Ohio and West Virginia authorize various types of "state brands." See *infra* note 64.

[49] See also the discussion in Harrison and Laine, *loc. cit. supra* note 46.

ginia, West Virginia, Ohio, Michigan, Iowa and Washington. These states sold some 83% of all of the alcoholic beverages marketed by monopoly systems in 1939.[50] They represent, consequently, the most active systems in the county. On the other hand several variants of the monopoly method, while interesting, are not included. Wyoming, as has been pointed out, restricts its monopoly to wholesale business. Alabama provides for a state-administered monopoly but stores may be established in a county only after a favorable vote in the area concerned. Most of the area of North Carolina is dry, but any county may by referendum elect to install a system of county stores which operates under state supervision.[51] Several Maryland counties, outside of the city of Baltimore, operate county dispensaries. In both Minnesota and Wisconsin municipalities may and do operate municipal stores. None of these special systems do a sufficient volume of business, nor are they territorially sufficiently comprehensive to justify extensive treatment.

Administrative Organization

The monopoly states, altogether, show different degrees of control which for present purposes can be summarized in three categories. First, there is the class of states that permit "on-premise" sale by licensees who have purchased their stock by or through the monopoly. Pennsylvania, Ohio and Michigan fall into this group. Second, there are states that do not permit the sale of distilled beverages for "on-premise" consumption. Virginia and West Virginia are in this class. The former, however, permits the sale of heavy wines and beer, while the latter forbids the consumption in a public place of any "intoxicating" liquors. The third type represented by Washington and Iowa restrict the purchaser at state stores by requiring individual permits to buy.

All of the monopoly systems are administered by multi-membered boards, and all are established as separate state departments. There are, however, interesting variations in the form of the departmental executive. In two states, elective state officers are *ex officio* members of the administrative board. These are Wyoming and Michigan. In the former state such officers compose the entire membership of the control board, while in the latter they are a minority of the membership.[52] In Wyoming the *ex officio* body acts through a director, but in Michigan a quite different method is used. In that state the liquor control commission consists of five members—the governor and secretary of state, *ex officio,* and three additional members appointed by the governor with the advice and consent of the senate. The appointed members are required to devote their entire time to the duties of their office. One of their number is chairman. A quorum consists of one *ex officio* member and two appointed

[50] 1939 sales are reported by Distilled Spirits Institute, *Public Revenues from Alcoholic Beverages 1939* (1940).

[51] ALA. BEVERAGE CONTROL ACT, Ala. Acts 1936-1937, No. 66. N. C. CODE (1939) c. 66.

[52] Wyoming members are the governor, secretary of state, and state treasurer. WYO. REV. STAT. (Supp. 1940) c. 59, art. 4, §401.

members, but an *ex officio* member may act through a deputy and in consequence actual participation by the state officer is not necessary.[53]

As a general rule, administrative authority is granted to the control board without distinguishing among the various functions involved in the control process. Various adaptions have occurred from state to state. In Pennsylvania, for example, it appears that the board acts in a collegial capacity with operating divisions in immediate control of directors. In West Virginia the practice has been for the chairman to assign operating divisions to the various members for immediate supervision. In Virginia a similar distribution of supervision has been used. In both instances quasi-legislative, quasi-judicial and monopoly policy decisions are reserved to the commission as a whole. In West Virginia, however, the chairman, who is named by the governor, has at times assumed a dominating role in commission affairs that relegates his associates to the position of administrative subordinates.

Only one of the states examined shows a carefully planned separation of function between the state control board and a separately appointed director. That state is Ohio, where the internal organization of the department of liquor control strongly resembles that of the Civil Aeronautics Authority under the Civil Aeronautics Act.[54] The Ohio agency consists of a board of four members and a director of liquor control. All are appointed by the governor with the advice and consent of the senate, but the members serve for four year terms while the director holds office during the pleasure of the governor. As powers are distributed between the board and the director, the latter, in contrast to the situation found in most states, is by far the most important officer of the department. The board adopts all rules and regulations except those relating to the management of state liquor stores. It also fixes prices for the sale of liquor at state stores, imposes diciplinary action upon permittees and hears appeals from the department. The director administers the affairs of the department, grants or refuses permits, manages the store system and enforces the liquor law.[55]

The span of activities embraced within state monopoly agencies depends largely upon the type of control used. Iowa, West Virginia and Washington are illustrative of states where the spread of responsibility is relatively narrow. In both Iowa and West Virginia the control of "non-intoxicating" beer is relegated to a separate state administrative agency.[56] In neither state is "on-premise" sale of distilled liquors permitted. In both, wholesale sale to special permittees is through the state monopoly. In consequence the administrative task is limited to the operation of the state store system, the licensing and regulation of manufacture and transportation, and the

[53] LIQ. CONT. LAW §5, *supra* note 47.

[54] OHIO GEN. CODE (1938) §6064 (2-8 incl.). *Cf.* Civil Aeronautics Act, 52 STAT. 980-986 (1938), 49 U. S. C. §§421-458.

[55] Appeals from decisions of the director regarding permits may be taken to the board. In 1939, 1350 applications were rejected and 734 appeals from these actions were taken. The department was sustained in 292 and reversed in 442 instances. In view of the large number of reversals, it should be noted that the department rejected many applications so that a full hearing might be had on appeal at which all parties could be heard. OHIO DEPT. LIQ. CONT., ANN. REP. (1939) 11-12.

[56] In Iowa, the state treasurer's office; in West Virginia, the state tax commissioner.

enforcement of the state law. The Iowa commission, moreover, relies largely upon local enforcement officers. In Washington the control agency licenses and regulates the retail sale of beer, but "on-premise" sale of distilled beverages is banned.

A state occupying a rather intermediate position is Virginia. There "on-premise" sale of distilled liquor is prohibited but the sale of wine and beer is licensed. In consequence the Virginia alcoholic beverage commission has a broader span of authority measured by the responsibility of retail licensing, supervision of licensees and diciplinary action with attendant quasi-judicial functions.[57]

The broadest span of responsibility and most complex combination of powers is found in the three states of Pennsylvania, Ohio and Michigan. In these states "on-premise" sale of distilled liquors is permitted. In consequence the state control agency has the responsibility of administering the licensing control of on-premise consumption in addition to the management of state stores (and in some instances subsidiary retail outlets) and the enforcement of the control law. These three states represent the widest administrative responsibilities found in any of the state liquor control agencies. The Ohio department of liquor control, for example, manages 204 stores and 58 agencies selling $51,696,000 of alcoholic beverages during 1939. On the side of regulatory control, 29,426 permits of 22 different types were issued during the same year. Administrative proceedings involving violations of law and departmental regulations on the part of permittees numbered 1052. Fiscal operations included the handling of proceeds of sales, the purchase of stocks to the value of some $33,000,000, the remittance to the state treasurer of nearly $7,500,000 in state gallonage taxes, and the distribution of some $5,750,000 in permit fees to local subdivisions. Enforcement activities showed 2152 raids and 2098 arrests during the year. The operations were administered by a full and part-time personnel averaging 1428 persons at a total expenditure for the year of $3,622,000.[58] These data indicate the total work load of the department and its approximate distribution over the span of different administrative operations.

As a general rule the monopoly states show a much greater concentration of control authority at the state level than do the license states. Iowa and Washington rely heavily upon local authorities in the enforcement of law, but only to a minor extent does this involve questions of administrative policy or action. In Virginia the local subdivision may require a license of a person holding a state license or permit.[59] Maximum amounts are set for local fees by state law. It appears that these local licenses are fiscal rather than regulatory in character. Michigan is the only state examined that contemplates a local regulatory control and in that instance the state commission is required to revoke a license for "on-premise" sale when so requested by a local legislative body.[60]

[57] ALCOHOLIC BEVERAGE CONTROL ACT (1934) §§18, 25, VA. CODE (1936) §4675 (1-90).

[58] See the impressive ANN. REP. (1939) *passim*. [59] ALC. BEV. CONT. ACT §26, *supra* note 57.

[60] This requirement applies only to counties under 500,000 population, LIQ. CONT. LAW §17, *supra* note 47.

Operation of the Monopoly

Thus far the discussion of the monopoly states has considered the general scope and characteristics of the proprietary method, the forms of administrative organization found in state monopoly agencies, the span of administrative responsibilities, and types of relations with local jurisdictions. Attention now turns to the operation of the monopoly method and its characteristics in the several states examined.

It has been pointed out above in this discussion that each state using the monopoly method also employs enabling powers for the regulation and control of those phases of the liquor business falling beyond the proprietary method. This regulatory side of the monopoly method varies in importance from state to state depending primarily upon the degree to which "on-premise" consumption of distilled beverages is permitted. In any case, the use and operation of licensing powers does not differ from the practice of the licensing states. Conditions precedent to the granting of licenses, the application of restriction to licensees, and disciplinary methods and penalties are all substantially the same.[61]

The state liquor monopoly is one of distribution and as such it reserves to the state the sale of beverages at wholesale and retail. Manufacturing as such is not within the monopoly but in some states the monopoly is authorized to market its own brands of liquors in the expectation that advertising and similar costs can be eliminated and retail price materially reduced. State control agencies in Washington and Ohio are authorized to purchase beverages in bulk and to bottle them for retail sale.[62] This process includes rectifying. West Virginia authorizes its state commission to contract for the production of liquors to bear special "state brands."[63] Of these states Washington is the only one that appears to have made extensive use of its powers. Early in the history of the Washington Liquor Control Commission experiments were begun with the importation of Scotch whiskey and the purchase of California wines in bulk. Later Canadian whiskey was added to the list of state brands. This activity has developed until, during the year ending September 30, 1939 more than 130,000 cases of beverages were bottled, a business aggregating $720,688 of which $118,588 represented the profits of the bottling plant. State bottled brands, however, amounted to only some five per cent of the total sales at state stores in the state.[64]

Of the states examined only two—Ohio and Michigan—limit by statute the number of state stores that may be established. In both instances a ratio based upon population is established. In Ohio the maximum is five to each county and one addi-

[61] See: for Va., Alc. Bev. Cont. Act. §§20-25, *supra* note 57; W. Va. Code (1937) c. 60, art. IV; Ohio Gen. Code (1938) §6064 (14-28 incl.); Iowa Liq. Cont. Act §§29-32, *supra* note 9; Wash. State Liquor Act §§23(A)-28 incl., particularly §27, Wash. Acts 1933; Pa. Liquor Control Act (1933 as amended 1935) §§404, 410, Purdon's Pa. Stat. tit. 47, §744; and for Mich., Liq. Cont. Law §§17-20, *supra* note 47.

[62] Wash. State Liq. Act §69(b) (general authority); Ohio Gen. Code (1938) §6064(11).

[63] W. Va. Code (1937) 60-3-15.

[64] Wash. State Liq. Cont. Bd., Ann. Reps (1934-1939) schedule c-3.

tional for each thirty thousand population in excess of the first forty thousand.[65] The Michigan statute authorized one store in each incorporated place of three thousand or more, and one for each forty thousand inhabitants of the county. The Ohio restriction includes agencies as well as stores but the Michigan standard apparently does not cover "specially designated distributors" that also sell for off-premise consumption.[66]

In addition to state operated stores several states designate private mercantile establishments as agencies of the state monopoly to supply areas where the operation of state stores may not be feasible. Ohio and West Virginia use the state agency as transitional devices—retail outlets to meet consumer demand until a state store can be located to serve the district. Particularly in West Virginia agents are subject to strict supervision with a view to maintaining as nearly as possible the same conditions of sale that are stipulated for state stores.[67] The ratio of stores to agencies is surprisingly similar in the two states. Ohio operates 204 stores and 58 agencies; West Virginia, 105 stores and 26 agencies.[68]

The Washington statute also authorizes the use of agencies but the ratio is reversed, 51 stores to 129 agencies.[69] The Iowa commission, on the other hand, is authorized to establish agencies, but apparently has none in operation.[70] In this connection it is worth noting that a proportionately large number of state stores, 170, is operated in the latter state. Michigan has a somewhat unique agency system. Any hotel or established merchant may be designated a "specially designated distributor."[71] A distributor located more than one mile from a state store may sell from seven in the morning until two the succeeding morning. One situated within a mile of a store may sell only from seven until ten in the morning, and from six in the evening until two the following morning. The result is to make alcoholic liquors available for sale for off-premise consumption at any time except from two until seven in the morning. These conditions are more liberal than license sale for off-premise consumption in many of the license states. Agencies, moreover, are permitted to deliver orders placed personally by customers.[72]

Generally speaking there are no greater restrictions upon purchasers at state stores than are found in license states with respect to sales by licensees. Interdicted persons usually are minors, habitual drunkards, or intoxicated persons. In some states, West Virginia for example, customers fill out an order blank which includes a declaration that the purchaser is legally entitled to buy. This order, however, is more important for inventory control than for regulation. Two states—Washington and Iowa—re-

[65] OHIO GEN. CODE (1938) §6064(11). [66] LIQ. CONT. ACT §13, *supra* note 47.

[67] See the interesting Rules and Regulations, and Manual of Specific Store and Agency Procedures, issued in 1939 by the West Virginia Liquor Control Commission.

[68] As of 1939. See the annual reports of the state control agencies.

[69] WASH. STATE LIQ. ACT §69, *supra* note 47.

[70] IOWA LIQ. CONT. ACT §10, *supra* note 61. [71] LIQ. CONT. ACT §14, *supra* note 47.

[72] Mich. Liq. Cont. Comm., Rules and Regulations for Specially Designated Distributors, effective Nov. 1, 1937.

quire the purchaser to obtain a personal permit to buy. In Washington this permit may be revoked if the holder becomes an interdicted person and the grounds are explicitly stated in the statute.[73] In Iowa a personal permit is also required which may be revoked for non-support or desertion of dependents in addition to the usual grounds.[74] The state commission, moreover, is authorized to prescribe the kind and quantity of liquor that may be purchased. In a most unusual and rather questionable exercise of this power the commission has prohibited persons on work relief, whether local, state or national, from purchasing. In addition the limitation of sales to permit holders, as to "kind, quantity and character" is left in the absolute discretion of the manager of the liquor store.[75] So far as has been discovered this is the most stringent and uncontrollable restriction upon individual purchasers of legal liquor in the United States.

In brief, the monopoly method of liquor sale accomplishes its regulatory purposes by competition with illegal beverages and except in one instance, Iowa, attempts no direct restraint upon the individual purchaser not commonly found in the license states. The purpose of the monopoly is achieved if purchases are confined to legal channels which assure quality and fair price to the buyer and a reasonable profit from sale to the state. Control that can be clumsy and difficult when attempted through regulatory action is relatively simple when effected through the monopoly system. Manufacturers, importers or distributors who commit acts of dubious propriety can simply be excluded from doing business with the monopoly. Specifications of beverages and samples are required and deliveries are rigidly checked by chemical analysis to assure standards of potability and uniformity of quality. Transportation is by state trucks or under contract. Thus all other movements are presumptively illegal. Elaborate and systematic internal controls of inventory, stock movement and sales volume permit precise measurement of sales trends, stock requirements and customer demand. Most of this internal routine is geared to business machine operations. The atmosphere of the state store, moreover, is carefully arranged to avoid the stimulation of customer demand. No brands are recommended, no price wars occur, and there is never the problem of "loss leaders," inferior products or special sales.

Any estimate of the effectiveness of the monopoly system is beyond the scope of this treatment. Suffice it to point out that a very substantial amount of business is done by the monopoly states—in excess of $270,000,000 in 1939; generally speaking these beverages were marketed with a minimum of public scandal and complaint; and the monopoly method appears to have reduced the number of local areas going "bone-dry." Presumptively this is a good record—and a particularly laudable one when it is considered that the state store system was the first large scale venture in proprietary control by American states.

[73] WASH. STATE LIQ. ACT §§12-19, *supra* note 47. A fee of 50 cents is charged. It appears that some 334,000 permits were sold during 1939.

[74] IOWA LIQ. CONT. ACT §§13, 20-28, *supra* note 9. A fee of $1 is charged and 170,000 permits were issued in 1939.

[75] Iowa Liq. Cont. Comm., Regulation of Nov. 20, 1935.

CONCLUSION

The broad perspective of liquor control activities by the various states shows no dominating pattern. On the contrary the observer sees, on the surface, a mosaic of many different regulatory devices, administrative institutions and control procedures. This infinite variety has not come by accident nor yet by express design. It is rather the consequence of a myriad of influences and pressures, some clear and obvious but others subtle and intangible. A deep-rooted repugnance for the public drinking place has, for example, led in some states to the prohibition of all sales by the drink. Yet administrative forms and institutions, constructed to apply such restrictions, are generally more conditioned by local political mores than by a formal theory of administrative organization.

There is no easy, simple formula for the evaluation of state liquor control, for there is no magic in any particular method for effecting public policy. No objective test is available unless it is one that estimates the degree to which the community standards are effectively, and efficiently, expressed through administrative forms. This is at best a test of experience that can be applied only over a long period of time and with a sensitive appreciation of the environment in which control efforts are applied. In this sense state liquor control is still very much in the laboratory stage, but the laboratory is so large in expanse and houses so many simultaneous experiments that accurate observation and reliable inference are all but impossible.

Viewed with an eye to the future, however, state efforts at liquor control are indeed a proving ground for regulatory method. Unique devices such as state administrative review of local ordinances, administrative appeals from local regulatory action, proprietary monopolies and discretionary restraints upon individual purchasers, to name only a few, are full of significance not alone to the rational development of liquor control, but also to the maturing of all efforts at the public regulation of economic activity. There is no other field of public action in which regulatory activity is so comprehensive, so extreme, and yet so diversified. Within its bounds the states may indeed develop and refine regulatory techniques that will find significant application in other fields of public control.

LEGAL QUESTIONS IN THE OPERATION OF THE LICENSING SYSTEMS

Virgil W. Cooprider*

Prior to national Prohibition, the responsibility for liquor control was left, with few exceptions, to local officials. As a result, policies and procedures varied with each locality and were subject to frequent change. From this situation there developed a chaotic condition which greatly accentuated the need for a uniform national policy and was thereby one of the principal factors in bringing about Prohibition.[1] Since Repeal, the tendency has been to follow a middle course and centralize control in the state and thus provide a basis for working out uniform state policies. It was upon this theory that state legislators undertook the task of drafting new liquor control legislation. Since the pre-Prohibition statutes were of little help, most of this legislation has been experimental. The 45 states not having prohibitory provisions have set up varied types of control in an effort to determine the type best adapted to the particular state. The types of control adopted by these states may be divided into two general categories.[2] Seventeen have instituted systems of state operation of liquor stores generally referred to as monopoly systems. The remaining 28 states have restricted private trade by establishing liquor licensing systems. Most of the states, finding their earlier efforts not completely satisfactory, have continued to amend, add to, or delete portions of existing statutes. This experimentation, and the fact that enforcement of liquor control legislation is one of the most difficult tasks of government, has resulted in much litigation raising many interesting legal questions concerning the control systems. This article deals only with questions arising out of the licensing systems as brought out by a study of the reported decisions of courts since Repeal.

Since the licensing system of control generally operates through an administrative agency, many of the questions or problems that arise are those applicable to administrative tribunals generally. These questions may be divided into three broad categories. First, questions concerning delegation of power. Second, questions arising

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[1] See Byse, *Alcoholic Beverage Control before Repeal*, *supra* 544, at 549.

[2] Any classification of states on the basis of a single type of control system is superficial. In the so-called monopoly states, the monopoly generally extends to sale of package liquors only. A separate license system is set up in some of these states for sale of liquor for consumption on the premises, or for sale of light wines and beer. Even in the "dry" states, license systems are used for regulation of the sale of beer.

out of the exercise of the powers delegated. Third, methods by which one aggrieved by action of the control authority may obtain administrative or judicial relief.

QUESTIONS CONCERNING DELEGATION OF POWER

One of the most common attacks made upon the liquor licensing systems is that upon the validity of the transference of power from the legislature to the licensing authority. Most of the states having a licensing system have placed the dominant control of the liquor traffic under existing state fiscal agencies or under specially appointed state liquor control officers or boards. However, in only four states is the control of these agencies exclusive. The other states have granted to local authorities, either county, municipal, or a combination of both, a power of participation in the control.[3] In general, the power vested in these agencies by the legislatures may be divided into two parts: (1) the power to issue, deny or revoke licenses and, (2) the power to make such rules and regulations as may be deemed necessary for the efficient administration of the state control statute. It is an attack upon the foundation of this control structure that is made by litigants, generally licensees who have been adversely affected by a decision or regulation, in an effort to have the control statute declared unconstitutional as an illegal delegation of power.

Although all of the states have constitutions which either expressly require separation of powers of the various branches of government or which are construed as requiring such separation,[4] it is generally recognized that a legislature may delegate administrative functions if a standard is prescribed as a guide for the action of the administrative agency.[5] Under this general rule, several types of questions arise as to the licensing systems.

What powers may be delegated? By and large, the delegation of authority has been very broad, the powers of control agencies over persons and property extraordinarily sweeping. For example, control authorities are given discretionary power to issue, deny, or revoke licenses, power to determine suitability of persons and premises for licenses, hold hearings, fix the number of licenses, forbid brewers, wholesalers, or manufacturers to have any interest in the retail licensee's property, regulate hours, location, size of containers, labeling, prices, advertising and employees.[6] Furthermore, it should be noted that these powers are not limited to control over intoxicating liquor. Several cases have raised the question whether the delegated powers include the power to regulate non-intoxicating liquors.[7] Without exception, the courts have held that, since the legislature has the power to regulate liquors which are non-intoxicating in order to make its control of intoxicants effective, this power

[3] CULVER AND THOMAS, STATE LIQUOR CONTROL ADMINISTRATION A STATUTORY ANALYSIS (1940) 2.

[4] GOODNOW, THE PRINCIPLES OF ADMINISTRATIVE LAW OF THE UNITED STATES (1905) 31.

[5] Berger v. Quinn, 149 Misc. 545, 268 N. Y. Supp. 514 (1933); Coady v. Leonard, 132 Ohio St. 329, 7 N. E. (2d) 649 (1937).

[6] CULVER AND THOMAS, *op. cit. supra* note 3, at 49.

[7] Johnson v. Board of County Commissioners, 147 Kan. 211, 75 P. (2d) 849 (1938); Berger v. Quinn, *supra* note 5; Fylken v. City of Minot, 66 N. D. 251, 264 N. W. 728 (1936); Riggins v. Dist. Court of Salt Lake County, 89 Utah 183, 51 P. (2d) 645 (1935); Hinebaugh v. James, 119 W. Va. 162, 192 S. E. 177 (1937).

may be delegated along with the power to control intoxicants. The courts have been very liberal with the legislatures in their control efforts and have permitted them to place these broad powers in the control agencies generally stating the reason to be the harmful nature of the subject matter dealt with.[8]

The power of the control agency which has been most frequently attacked is the discretion which it may exercise. The vesting in the control body of adequate discretionary powers in issuing, denying and revoking licenses, however, is one of the most important factors of successful liquor control.[9] The many factors connected with licensing which cannot be adequately provided for by definite rules or by provisions of the statute make the exercise of discretionary powers imperative. The cases present several illustrations of the desirability of this power. In a New York case,[10] the State Liquor Authority revoked a restaurant liquor license on the ground that the licensee had ceased to operate a *bona fide* restaurant. At the time the premises were inspected, the only food found was a half box of uncooked spaghetti. The court upheld the right of the authority to exercise discretion. In a similar case,[11] the Connecticut Commission refused to grant a restaurant liquor permit on the ground that, although the place was well equipped to do restaurant business, it was merely a sham and not a *bona fide* restaurant. The Supreme Court of Errors of Connecticut upheld the action of the Commission as not arbitrary or an abuse of discretion.

Most states except clubs from some of the restrictions of the control statutes such as a prohibition of the sale of alcoholic beverages in places concealed from public view. Because of these exceptions or privileges, the attempt is frequently made to be classed as a club.[12] The control agency must have free discretion to discriminate between false and *bona fide* applications for club licenses.

Exercise of discretion is also desirable where a close relative of an ineligible person applies for a liquor license. Thus, in a Connecticut case where the plaintiff's husband had been denied a license after which the plaintiff applied for a license in her own name, the court upheld the Commission's refusal to grant the permit as a valid exercise of its discretion.[13]

The liquor control laws in general show that the legislatures have recognized the desirability of administrative discretion. Most of the statutes now contain provisions granting such discretion to the control authority either expressly or by implication from the language used. Where there has been an express provision for exercise of discretion, the courts usually interpret the statute to mean reasonable

[8] Premier-Pabst Sales Co. v. State Board of Equalization, 13 F. Supp. 90 (1935).

[9] Harrison and Lane, After Repeal (1936) 81.

[10] Scalise v. State Liquor Authority, 160 Misc. 390, 289 N. Y. Supp. 939 (1936).

[11] Melarose v. Liquor Control Commission, 123 Conn. 318, 194 Atl. 725 (1937).

[12] Meserole v. Liquor Control Commission, 125 Conn. 463, 3 Atl. (2d) 664 (1939); Liquor Control Commission v. Fraternal Order of Eagles, 286 Mich. 32, 281 N. W. 427 (1938); Commonwealth v. West Philadelphia Fidelio Mannerchor, 115 Pa. Super. 241, 175 Atl. 434 (1934); Appeal of Young Men's Republican Club, 125 Pa. Super. 486, 190 Atl. 527 (1937); Portuguese-American Independent Social Club v. Costello, 6 Atl. (2d) 717 (R. I. 1939).

[13] Wilks v. Liquor Control Commission, 122 Conn. 443, 190 Atl. 262 (1937).

discretion.[14] Under this interpretation, if a court finds that the authority acted arbitrarily or in abuse of its discretion, that action will be held invalid.[15] However, the courts tend to sustain the action of the control authority under its discretionary power. In upholding action of the authority under this power, the courts generally state that they are not authorized to hold the licensing body's action arbitrary or capricious where such action is based on evidence from which reasonable men might honestly differ.[16]

Although most courts require that the discretion be reasonable, some have held that where a statute expressly confers a power to exercise discretion the licensing authority may even act arbitrarily or capriciously.[17] For example, the court in a Georgia case[18] in upholding the control authority's refusal to grant a license said, "Any person engaging in the business of selling malt beverages can lawfully do so only upon the basis of a mere privilege which the designated authorities are authorized to grant or refuse, or even to revoke after grant, in the exercise of an arbitrary discretion. The privilege is based upon a mere permit and may be refused for any reason or arbitrarily."

The right of the authority to exercise discretion may be implied in several ways. It has been held that the licensing authority has discretion where the statute provides that licenses "may be denied for cause"[19] or where the authority should "consider the requirements of the community"[20] before granting a license. If the statute definitely specifies the requirements which an applicant must comply with, the control authority may exercise a certain amount of discretion in determining if the requirements have been met.[21] This is especially true where the qualifications contain the words "suitability of person" or "suitability of place," or "good moral repute."[22] For example, the Iowa control statute[23] provided, among other requirements, that the licensing authority should satisfy itself of the good moral character of the applicant. In a case involving this provision,[24] the court refused to grant a writ of mandamus to compel the authority to issue a license on the ground that the authority had the right to exercise discretion in determining the moral character of the applicant. Although a statute specifically sets out certain grounds upon which the authority may deny or revoke a license, it has been held that these grounds are not exclusive and the authority has discretion to deny or revoke for other reasons.[25]

[14] Gwiazda v. Borgin, 121 Conn. 705, 185 Atl. 416 (1936); Silberglied v. Mulrooney, 150 Misc. 250, 270 N. Y. Supp. 290 (1934); Wright v. State, 176 Tenn. 628, 106 S. W. (2d) 867 (1937).

[15] Loglisci v. Liquor Control Commission, 123 Conn. 31, 192 Atl. 260 (1937).

[16] Van de Vegt v. Board of Commissioners, 98 Colo. 161, 55 P. (2d) 703 (1936).

[17] Phillips v. Head, 188 Ga. 511, 4 S. E. (2d) 240 (1939); Scott v. Township Board, 268 Mich. 170, 255 N. W. 752 (1934).

[18] Phillips v. Head, *supra* note 17.

[19] Yates v. Mulrooney, 245 App. Div. 146, 281 N. Y. Supp. 216 (1935).

[20] Van de Vegt v. Board of Commissioners, *supra* note 16.

[21] *In re* Mark, 115 Pa. Super. 256, 176 Atl. 254 (1934).

[22] Loglisci v. Liquor Control Commission, *supra* note 15; Fylken v. City of Minot, *supra* note 7.

[23] IOWA CODE (1935) c. 93-F2, §1921-f103.

[24] Madsen v. Town of Oakland, 219 Iowa 216, 257 N. W. 549 (1934).

[25] Blum v. Ford, 194 Ark. 393, 107 S. W. (2d) 340 (1937); *In re* Mark, *supra* note 21; *cf.* Klipsch v. Ind. Alcoholic Beverage Commission, 215 Ind. 616, 21 N. E. (2d) 701 (1939).

Although most of the states confer upon the state agency a power to make rules and regulations, only four license states specifically provide in the statute that such rules and regulations shall have the force and effect of law.[26] Thus it would seem that, in these states, violation of such rule or regulation would be treated as a criminal offense. Where such provision is not included in the statute, the effect is doubtful. It is also doubtful whether the legislature can confer upon the state agency the power to say that a violation of certain of its rules shall be a crime. In the cases involving this point that have arisen in this field, it has been held that this could not be done.[27] The New York act provided that "violation by any person of any rule of the State Board shall be a misdemeanor *if such rule so provides*."[28] The Board instituted a rule prohibiting sale of liquors during certain hours on Sunday and provided that a violation should be a misdemeanor. The defendant violated the rule and was convicted. The appellate court reversed the conviction,[29] holding the provision of the act was invalid as an attempt to delegate to the unrestricted volition of an administrative board so essentially a legislative function as the definition of a substantive criminal offense. Thus, it seems that if the legislature declares that violations of the rules of the Board shall be a misdemeanor, the provision is valid. But the legislature cannot allow the Board to make the declaration according to this case.

Scope of the powers granted. Although the courts tend to refrain from placing restrictions upon the legislatures in their delegation of power in this field, they are more strict in their supervision of the administrative agency in its exercise of such powers. The administrative body must confine its activity strictly to the scope of the powers delegated. Thus in the Connecticut case of *Loglisci v. Liquor Control Commission*,[30] the Commission revoked a license on the ground that the licensee was an unsuitable person because he employed his infant son on the premises. The act did not forbid the employment of minors but did give the Commission a discretionary power to revoke licenses and to enforce the provisions of the act and "to make all needful rules and regulations for that purpose." The act also provided that "every regulation made by the Commission shall have the same force and effect as law, unless and until set aside by some court of competent jurisdiction or revoked by the Commission." The court held that since the employment of minors was not forbidden by the act or by a regulation of the commission, the commission exceeded its power when it revoked the license on this ground. Said the court, "The power conferred to make regulations for carrying a statute into effect must be exercised within the powers delegated, i.e. must be confined to details for regulating the mode of proceeding to carry into effect the law as it was enacted, and it cannot be extended to amending or adding to the requirements of the statute itself." Some of the state

[26] CULVER AND THOMAS, *op. cit. supra* note 3, at 42.

[27] People v. Grant, 242 App. Div. 310, 275 N. Y. Supp. 74 (1934); People v. Ryan, 267 N. Y. 133, 195 N. E. 822 (1935).

[28] N. Y. Laws 1933, c. 180, §97 subd. 4.

[29] People v. Ryan, *supra* note 27.

[30] *Supra*, note 15.

acts definitely provide that rules and regulations promulgated by the board shall not be inconsistent with the act.[31]

It may be of interest here to note other instances in which the action of the state authority has been successfully contested on the ground of excess of authority. A ruling of the New York A. B. C. Board requiring all persons receiving a license to sell liquor to publish a notice once a week for two successive weeks in a daily paper was held to be unauthorized as the statute provided that publication could be in either daily or weekly papers.[32] A regulation of the Connecticut Liquor Control Commission providing that liquor could be sold by druggists only under a package store permit, although the act provided that the Commission should issue, among other types of permits, druggist as well as package store permits, was held void as beyond the power of the Commission.[33] A New Hampshire court held that the state control commission could require a licensee to furnish a key to the enforcement officers of the commission but it could not require an additional key to be furnished to the local chief of police.[34]

In Maine, the State Liquor Commission made a regulation requiring out-of-state manufacturers and wholesalers to obtain a certificate of approval costing $200 before they could do business in the state. The court vigorously denounced this action as an usurpation of a prerogative which belonged to the legislature.[35] In this instance, the act not only did not provide for such regulation, but the legislature had recently voted against placing a provision in the act requiring such a certificate. It is interesting to note that the legislature of New Hampshire earlier had placed such a provision in its act which was upheld by a federal court as not an undue interference with interstate commerce.[36]

How definite must the standard prescribed by the legislature be? To what extent must the legislature determine policy by the statute or to what extent may that be left to the control agencies to determine through rules, regulations and decisions? The courts have generally held that the standard set out by the legislature to guide the control authorities has been sufficient.[37] Some of the courts have expressed the opinion that, since the state may completely prohibit the sale of liquor, the standard may be a very general one. Thus it has been said that the standard may be in its nature a general one if it is capable of reasonable application under the circumstances.[38] The court in an Ohio case[39] even intimated that a standard of any kind might be dispensed with in legislation of this type. In this case, the state control board restricted the advertising of intoxicants almost to the point of prohibiting it.

[31] City of De Ridder v. Mangano, 186 La. 129, 171 So. 826 (1936); Bodkin v. State, 132 Neb. 535, 272 N. W. 547 (1937).

[32] Sesselberg v. Schoeneck, 151 Misc. 267, 272 N. Y. Supp. 588 (1933).

[33] Murphy v. Bergin, 118 Conn. 249, 171 Atl. 433 (1934).

[34] Manchester Press Club v. State Liquor Commission, 89 N. H. 442, 200 Atl. 407 (1938).

[35] Anheuser-Busch v. Walton, 135 Me. 57, 190 Atl. 297 (1937).

[36] Dugan v. Bridges, 16 F. Supp. 694 (1936).

[37] Johnson v. Board of County Commissioners, *supra* note 7; Gaine v. Burnett, 122 N. J. L. 39, 4 Atl. (2d) 37 (1939); Bird and Jex Co. v. Funk, 96 Utah 450, 85 P. (2d) 831 (1939).

[38] Berger v. Quinn, *supra* note 5.

[39] Coady v. Leonard, *supra* note 5.

The state act provided only "... the Board of Liquor Control shall have power to adopt rules and orders necessary to carry out the provisions of the act including ... uniform rules and regulations governing all advertising with reference to the sale of beer and intoxicating liquors throughout the state and advertising upon and in premises licensed for its sale."[40] In holding that this was a valid delegation of power, the court said, "But the rule [requiring a standard] relaxes somewhat as to the necessity for such limitations and restrictions, where wide power is imperative in law enforcement, and many authorities have held that standards or criteria for guidance are not necessary in cases in which the discretion to be exercised by the administrative officers relates to police regulations, protection of public morals, health, etc. ... The standards or criteria set up by this statute are all sufficient when due weight is given to the object sought to be accomplished with reference to a traffic which the state may not only regulate, but entirely prohibit in the exercise of the police power."

Other cases have raised the problem of the power of the legislature to confer upon the control agency discretion to determine what applicants shall be granted a license without setting out specific qualifications in the statute to guide the agency. This delegation of power is generally upheld by the courts.[41] A typical statement of the reasoning is found in the Indiana case of *Fry v. Rosen*.[42] "The true distinction is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law." In many instances where local authorities must approve a license issued by the state authority before the license becomes operative, the matter is left to the discretion of such local authority without any standard whatever to govern its action.[43] Concerning such a provision, the court in the case of *Scott v. Township Board of Arcada Township*[44] said, "The discretion given the authority means the power to act officially according to what appears to it to be just and proper under the circumstances."

Participation of local authorities. As was pointed out earlier, the most important delegation of power is that made to the state control authority. The power of the legislature to set up ministerial agencies for this purpose is well established and has been questioned in very few cases.[45] Beyond the delegation of power to state agencies, 23 license states provide for local participation by delegating power of liquor control to local authorities.[46] One other state vests the entire control in local authorities.[47] The power of the legislature to make this delegation seems to have been well settled by cases arising before Prohibition.[48] Since Repeal, the power has been

[40] OHIO GEN. CODE (Page 1938) §6064-3.

[41] McKown v. City of Atlanta, 184 Ga. 221, 190 S. E. 571 (1937).

[42] 207 Ind. 409, 189 N. E. 375 (1934).

[43] Hodges v. Kennedy, 184 Ga. 400, 191 S. E. 377 (1937); Thielen v. Kostelecky, 69 N. D. 410, 287 N. W. 513 (1939).

[44] 268 Mich. 170, 255 N. W. 753 (1934).

[45] Fry v. Rosen, *supra* note 42; Berger v. Quinn, *supra* note 5.

[46] CULVER AND THOMAS, *op. cit. supra* note 3, at 3 and Table I.

[47] *Ibid.*

[48] Town of Houma v. Houma Lighting Co., 121 La. 21, 46 So. 42 (1908); State v. Hearn, 59 Ore. 227, 117 Pac. 412 (1911).

questioned in very few cases[49] and successfully in none. The amount and type of power vested in these local authorities vary greatly.[50] In some states, local authorities are given only power to approve or disapprove licenses granted by the state and to recommend revocation. In other states, local authorities are vested with substantially the same powers exercised by the state agencies. They may issue and revoke licenses and make rules and regulations. In at least one state, such rules and regulations must not be less stringent than those of the state agency.[51]

By their regulations in some states, local authorities may partially prohibit the sale of alcoholic beverages. For example, they may fix the hours of sale and forbid sale on Sunday and holidays;[52] they may limit the number of licenses issued;[53] and they may prohibit sale in certain locations by zoning ordinances and by rules denying a right to a license for any premises within a fixed distance from a church, school, hospital, etc.[54] Although partial prohibition may be achieved through this regulatory power, the power does not include the right to completely prohibit unless expressly granted.[55] Likewise, the grant of power to use discretion in issuing or refusing licenses usually is held not to confer a power to prohibit by refusal to issue *any* license.[56] However, some courts have construed the discretionary power as a substitute for local option and allowed local authorities to achieve complete prohibition in this manner.[57] In the *Scott* case,[58] the court said that the purpose of allowing the local authority to exercise discretion "was to permit each local municipality to determine whether beer and wine should be sold. To avoid expense incident to submitting the question to the voters, its determination was left to the governing local authority."

The power to completely prohibit any sale in the city or county is frequently expressly granted. This prohibition may be accomplished in one of two ways. First, the governing authorities, by ordinance or otherwise, may forbid the sale. The second method of local prohibition, and the more common, is local option. Although it would seem that the question of whether local option is an illegal delegation of power to the voters had been settled long ago, the question was raised in a recent

[49] Boyer v. Del. Liquor Commission, 173 Atl. 522 (Del. 1934); Tate v. Seymour, 181 Ga. 801, 184 S. E. 598 (1936).

[50] CULVER AND THOMAS, *op. cit. supra* note 3, at 54 and Table XII.

[51] Jefferson County *ex rel.* Grauman v. Jefferson County Fiscal Court, 274 Ky. 91, 118 S. W. (2d) 181 (1938).

[52] State *ex rel.* Floyd v. Noel, 124 Fla. 852, 169 So. 549 (1936); Mallock v. City of Mt. Morris, 287 Mich. 666, 286 N. W. 600 (1939); People v. Ryan, *supra* note 27; Townley v. Bruckman, 168 Misc. 422, 5 N. Y. S. (2d) 899 (1938).

[53] Jefferson County *ex rel.* Grauman v. Jefferson County Fiscal Court, *supra* note 51; Fenson v. State Liquor Authority, 244 App. Div. 847, 278 N. Y. Supp. 433 (1935).

[54] Silberglied v. Mulrooney, *supra* note 14; Jacob Oberson Inc. v. Seyopp Corp., 251 App. Div. 170, 295 N. Y. Supp. 346 (1937); Walker v. Pierce, 192 Ark. 797, 94 S. W. (2d) 693 (1936).

[55] Boyer v. Del. Liquor Commission, *supra* note 49; Walker v. Mayor, 187 Ga. 237, 200 S. E. 268 (1938).

[56] Thomas v. Ragsdale, 188 Ga. 238, 3 S. E. (2d) 567 (1939).

[57] Johnson v. Board of County Commissioners, *supra* note 7; Scott v. Township Board of Arcada Township, *supra* note 44.

[58] *Supra* note 44.

Tennessee case.[59] The court dismissed the contention briefly with the statement, "the law is complete in itself and leaves to voters only the question of its local operative effect."

A somewhat similar problem arose in Kentucky under the state act providing that no license should be granted for any place within 200 feet of a church, school or hospital without written permission of such institution. Having been denied a license on this ground, an applicant instituted an action asking that the provision be declared unconstitutional as an unlawful delegation of power to those institutions. The Kentucky Court of Appeals answered the contention by saying that the provision was similar to a local option provision and was valid.[60]

Other questions concerning delegation of power. The delegation of powers other than the legislative has been questioned in litigation arising in this field. An interesting contention was made by a plaintiff in a Massachusetts case.[61] The Commission had made a regulation specifying methods of sterilizing glasses used by licensees in business. The plaintiff contended that this was an usurpation of the power of the state board of health. In upholding the action of the Commission, the court held that there was nothing in the act setting up the board of health which was repugnant to the exclusive jurisdiction of the Commission over all matters relating to alcoholic beverages.

In an attempt to have a provision of the Indiana Liquor Control Act declared unconstitutional, one plaintiff contended that an administrative function had been delegated to the judiciary.[62] The state statute gave a right of appeal from the Alcoholic Beverage Commission but gave the court only the power to pass upon the reasonableness of any orders made by the board and to decide whether or not they are lawful. The court upheld the provision as not conferring an administrative function upon the judiciary.

The reverse of this last argument has been asserted in a few cases, the contention being that there has been an illegal delegation of judicial power to an administrative agency. The basis of such contention is generally the inclusion in the statutes of provisions conferring a discretionary power on the control agencies in issuing and revoking licenses and a power to hold hearings and ascertain facts. In a Pennsylvania case[63] in which the control board revoked a license and, under its discretionary power to do so, ordered forfeiture of bond, the surety contended that the exercise of the discretionary power to forfeit or not to forfeit a penalty bond is a judicial function which cannot constitutionally be delegated to an administrative agency. The court refused to consider this contention and dismissed the case on a technical point of procedure.

This contention of illegal delegation of judicial power is usually answered by the

[59] Clark v. State *ex rel.* Bobo, 172 Tenn. 429, 113 S. W. (2d) 374 (1938).
[60] Beacon Liquors v. Martin, 279 Ky. 468, 131 S. W. (2d) 446 (1939).
[61] Universal Machine Co. v. A. B. C. Commission, 16 N. E. (2d) 53 (Mass. 1938).
[62] Klipsch v. Ind. Alcoholic Beverage Commission, 215 Ind. 616, 21 N. E. (2d) 701 (1939).
[63] Commonwealth v. Penelope Club, 136 Pa. Super. 505, 7 Atl. (2d) 558 (1939).

courts in one of two ways. Some courts say that the powers exercised are administrative and not judicial and, therefore, not illegal.[64] Other courts uphold the provisions by holding that the functions are not judicial within the prohibition of delegation of judicial power, but are only quasi-judicial.[65] This line of reasoning is well illustrated in the case of *Keller v. Kentucky A. B. C. Board*.[66] Here the Board revoked a license to sell beer on the ground that the licensee was selling whisky without a license to do so, although the licensee had not been convicted of such sale. It was the exercise of this discretionary power of revocation that the licensee contested as an unconstitutional delegation of judicial power. In reviewing the case, the Kentucky Court of Appeals upheld the action of the Board. The Court states that administrative boards and commissions have become an essential part of governmental structure and in many instances it is necessary to grant power to these bodies which in some respects combine judicial, legislative and executive action and that these agencies must necessarily be given discretion in performing their duties of administering the law and in the matter of promulgating detail rules and regulations. "The existence of the ground upon which the license was revoked as a fact was a proper issue to be determined by the board as a fact finding body. There is no Constitutional objection to the exercise of such discretionary power as ascertaining facts and administering the law. True it is a quasi-judicial act, but it is not the exercise of judicial power within the meaning of that term as embodied in the constitution forbidding one department from usurping the functions of another."

The court in the *Keller* case concludes its opinion with this significant statement: "The act . . . provides that the courts, on review, may determine whether or not there was any substantial evidence to support the order of the board." In this statement another possible reason for the liberality with which the courts tend to treat liquor control legislation may be seen. In most states, ample provision is made for review of action of the administrative control agencies, thus enabling the courts to check action of the agency when desirable. It may be that as long as such review is provided for, the courts will not hesitate to permit legislatures to delegate broad powers over the control of liquor to administrative agencies.

QUESTIONS ARISING OUT OF EXERCISE OF THE POWERS DELEGATED

Many questions or problems arise out of the exercise of the powers which are vested in the various control agencies. These problems involve such questions as the rights of parties applying for licenses, grounds upon which licenses may be denied or revoked, proper procedure for revocation of licenses, and others.

The basis of many of these questions has been the provision of federal and state constitutions that no person may be "deprived of life, liberty or property without due process of law." The cases arising in the pre-Prohibition era seem to have quite definitely decided that liquor control statutes did not violate any of the provisions

[64] State *ex rel* Zugravu v. O'Brien, 130 Ohio St. 23, 196 N. E. 664 (1935).

[65] Townley v. Bruckman, *supra* note 52.

[66] 279 Ky. 272, 130 S. W. (2d) 821 (1939).

of the Fourteenth Amendment of the Federal Constitution. According to these cases, the right to engage in the sale of intoxicating liquors is not a privilege or immunity of citizens of the United States which the states are forbidden to abridge,[67] nor do the control statutes deprive a person of liberty or property without due process of law.[68] Finally, they hold that no one is deprived of the equal protection of the laws by these statutes unless such statutes provide classifications that are arbitrary.[69] However, since the cases arising after Repeal have continued to raise the questions, it may be well to consider a few of them and note the attitude of the courts today.

Denial of application for license. In general, the courts since Repeal have taken the same attitude toward these questions as the pre-Prohibition courts. The contention that the applicant for a license is denied liberty or property without due process of law by the licensing authority's refusal to grant a license is generally answered by the courts by the use of the term "police power."[70] Thus under the state's power to protect the health, morals and welfare of the public, the state may completely prohibit the sale of alcoholic beverages and, therefore, no one has an absolute right to sell them. Since the control statutes permit sale only under a license, the license is a mere privilege and an applicant is denied nothing to which he has an absolute right. This reasoning is well illustrated in the *Fry* case[71] in which the applicant was denied a license and contends that the action violated the Fourteenth Amendment of the Federal Constitution. There the court upheld the action of the licensing authority stating, "It is entirely for the General Assembly to say whether any permits shall be granted and upon what terms; and since neither appellee nor anyone else has any legally recognized interest in the securing of a permit, apart from the terms and conditions of the Alcoholic Beverage Act, it follows that none of the provisions of either the Indiana or the United States Constitutions designed to protect personal or property interests can be violated by the director's refusal to grant a permit to any particular person. Charter rights, license rights, contract rights are all subject to the inherent power of a government to protect the health, morals or welfare of the public. . . . The Supreme Court of the United States has frequently held that the Federal Constitution is not involved in the restrictive or prohibitive legislation of the states when exercised under its police power."

Closely related to the contention that the applicant is deprived of liberty or property without due process of law are the arguments that refusal to grant a license denies the applicant of the "equal protection of the laws" or that the state has abridged a "privilege and immunity" of a citizen. The equal protection argument arises when the state statute makes a distinction between classes of business or per-

[67] Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273 (1887); State v. Gray, 61 Conn. 39, 22 Atl. 675 (1891).

[68] Mugler v. Kansas, *supra* note 67; Brown and Bennett v. Powers, 146 Iowa 729, 125 N. W. 833 (1910).

[69] White v. Brocelin, 144 Mich. 332, 107 N. W. 1055 (1906); Bloomfield v. State, 86 Ohio St. 253, 99 N. E. 309 (1912).

[70] Tate v. Seymour, *supra* note 49; Berger v. Quinn, *supra* note 5; Texas Liquor Control Board v. Marine Exchange Social Club, 127 S. W. 967 (Tex. 1939).

[71] *Supra* note 42.

sons.[72] A good illustration is the Kentucky statute which provides that no license shall be granted for any place within 200 feet of a church, school or hospital, but excepts from this prohibition drug stores, hotels and private clubs.[73] The provision was upheld in a case[74] in which the court used this typical reasoning, "It is within the province of the legislature to make such classification as it deems best under its police power, and we are not concerned with the wisdom of the Act of the legislature, but only with its constitutionality. If that classification is not so arbitrary as to be unreasonable, and is put upon a rational basis which is calculated to accomplish the protection of the public safety, health, or morals, the courts cannot interfere with it." As to the argument that denial of a license violates the Fourteenth Amendment in that it abridges a privilege or immunity of a citizen of the United States, the courts seem to be unanimous in holding that the right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States.[75]

Revocation of licenses. Constitutional questions similar to those arising out of a denial of application for a license are also raised by licensees whose licenses have been revoked. The courts generally answer the due process argument with reasoning similar to that used in the cases involving a denial of a license. However, the additional argument or reason is used in revocation cases that a license is not property in any legal or constitutional sense and, therefore, a revocation made in pursuance of the statute does not deprive the licensee of property without due process of law regardless of how serious a loss may result.[76] In this connection, it is interesting to note that a liquor license has been held not to be property in the sense that it may be pledged, inherited or sold.[77] The reason for this is to insure that the licensees will hold their licenses free from any device which would subject them to the control of other persons.

The argument has also been made that revocation of a license impairs the obligation of contract and, therefore, violates the Federal Constitution. The courts answer this contention with the statement that a license is not a contract within the meaning of the constitutional provision forbidding the impairment of obligations of contract.[78]

The procedure necessary to revoke a license varies from state to state. The sentiment of the courts concerning revocation of licenses in general has been that if a license confers merely a privilege upon its holder, the privilege may be withdrawn without notice and without opportunity to be heard or even without any reason being

[72] Great A. & P. Tea Co. v. Mayor and Commissioners of Danville, 367 Ill. 310, 11 N. E. (2d) 388 (1937); Berger v. Quinn, *supra* note 5.

[73] KY. STAT. (Baldwin 1938 Supp.) §2554b-177. [74] Beacon Liquors v. Martin, *supra* note 60.

[75] Wylie v. State Board of Equalization, 21 F. Supp. 604 (1937); Silberglied v. Mulrooney, *supra* note 14; Marks v. Bruckman, 170 Misc. 709, 9 N. Y. S. (2d) 947 (1939).

[76] Johnson v. Liquor Control Commission, 266 Mich. 682, 254 N. W. 557 (1934); Yates v. Mulrooney, *supra* note 19; Marsh and Marsh v. Carmichael, 136 Neb. 797, 287 N. W. 616 (1939).

[77] Walsh v. Bradley, 117 N. J. L. 453, 190 Atl. 88 (1937); Fitzgerald Bros. Brewing Co. v. Meyers, 10 N. Y. S. (2d) 968 (1938). However, it has been held that in the event a receiver or assignee for the benefit of creditors of an individual holding a liquor license, or in the case of the licensee's death, the state authority might permit his legal representative to continue the business for the duration of the license: Breaston v. Morgan, 257 App. Div. 34, 12 N. Y. S. (2d) 99 (1939).

[78] Johnson v. Liquor Control Commission, *supra* note 76.

given. But if the license confers something more valuable than a mere privilege, it will be termed a property right which may not be taken away from him without notice and hearing. Whether a license will be termed a privilege or a property right by the courts depends to a large extent upon the court's concept of the desirability of the activity licensed.[79] Liquor licenses are generally termed a privilege by the courts and, therefore, in the absence of statutory provisions, the formalities of notice and hearing before revocation are not required.[80] Thus in a Georgia case in which the licensing authority had revoked a license without notice or opportunity for hearing, or charge preferred against the licensee and without any violation of any law by him, the court upheld the revocation.[81]

Although a license is generally termed a privilege, most states provide by statute that certain formalities must be observed in revoking a license.[82] Some statutes provide for a "fair hearing" before a license can be revoked. In these states, the licensee is generally entitled to formal notice of the hearing so that he will know the claims of the opposing parties.[83] The notice to which the licensee is entitled is defined as follows in *DeLucca's Liquor License Case:*[84] "Due notice means at least that the licensee be informed that he has been charged with specific violations of the liquor laws or of regulations of the Board, and will be given a hearing at a designated time and place, and such notice must be given in sufficient time to allow the licensee to prepare an answer to the charges." At the hearing, it has been held that the licensee has a right to counsel and to produce witnesses in his behalf.[85] In some instances, the licensee may insist upon the right to be confronted with witnesses and cross examine them.[86] In the conduct of the hearing the procedure is somewhat informal and it has been held that the strict rules of evidence which control judicial officers do not have to be rigidly enforced.[87] However, a New York case[88] held that "A trial which proceeds to a conclusion resulting in a quasi-judicial determination depriving a party of legal rights, can well be said to be unfair if the determination is based on a finding of fact which is not supported by Common Law proof of probative character." In another New York case,[89] the requirements of a fair hearing were set out as follows, "When the statute provided for a hearing at which the licensee should be given an opportunity to be heard before his right to do business could be taken from him, and when it made the action of the liquor authority subject to review by the court, that necessarily carried with it the requirement that the

[79] GELLHORN, ADMINISTRATIVE LAW (1940) 373.

[80] Blum v. Ford, *supra* note 25; State *ex rel.* Zugravu v. O'Brien, *supra* note 64.

[81] McKown v. City of Atlanta, *supra* note 41.

[82] City of Fairfield v. Pappas, 362 Ill. 80, 199 N. E. 292 (1935); State *ex rel.* Spencer v. Anderson, 101 S. W. (2d) 530 (Mo. 1937); Seila's Liquor License Case, 124 Pa. Super. 519, 190 Atl. 203 (1937); Bradley v. Texas Liquor Control Board, 108 S. W. (2d) 300 (1937); CULVER AND THOMAS, *op. cit. supra* note 3, at 43, Table X.

[83] Pettengell v. A. B. C. Commission, 295 Mass. 473, 4 N. E. (2d) 324 (1936); Commonwealth v. Penelope Club, *supra* note 63.

[84] 124 Pa. Super. 500, 190 Atl. 195 (1937).

[85] State *ex rel.* Spencer v. Anderson, *supra* note 82.

[86] Brenner v. Bruckman, 253 App. Div. 607, 3 N. Y. S. (2d) 265 (1938).

[87] Yates v. Mulrooney, *supra* note 19.

[88] Townley v. Bruckman, *supra* note 52.

[89] Yates v. Mulrooney, *supra* note 19.

license could be annulled on competent proof only, and made the liquor authority something more than a mere administrative body; it gives to that body quasi-judicial functions. The licensee is protected in his right to retain his license unless it be ascertained upon a hearing that good cause exists for its revocation. He must be confronted with the witness, and be given an opportunity to cross examine his accusers. Otherwise he has not had a fair hearing."

Some of the control statutes definitely specify the causes for which a license must be revoked. One of the most common of these is the violation of the liquor laws or a rule or regulation of the control authority.[90] In addition to the causes for which a license must be revoked, the statutes sometimes specify causes for which they may be revoked in the discretion of the authority. Other statutes merely provide that licenses must be revoked for certain causes and may be revoked for "good cause." These discretionary revocation provisions enable the licensing authority to revoke licenses which have been obtained by misrepresentation of facts by the applicant.[91] A good example of this is found in a Pennsylvania case[92] in which the real owner of the premises had held a license which had been revoked. Later his daughter-in-law obtained a license representing herself as the owner of the premises. The court upheld a revocation of this license on the ground that the licensee was not the *bona fide* proprietor of the premises. It has also been held that a license was properly revoked where the applicant misrepresented his criminal record in his application.[93]

It has been held that the revocation order may be made after the license expires for violations which occurred while the license was still in effect. This is well illustrated in a Pennsylvania case[94] in which the court held that the license should have been revoked even though it had expired because the loss of the privilege granted by the license is not the only consequence of revocation. The licensee's bond may be forfeited, the licensee becomes ineligible to receive another license for three years and no license may be granted for the premises for a period of one year under the state statute.

Effect of revocation upon licensee's bond. It is a general practice among the license states to require applicants for licenses to provide a bond. Several cases have raised questions concerning the effect of revocation of a license upon these bonds. The courts generally construe the bonds as forfeiture bonds and not as penalty or indemnity bonds to cover any penalties which the licensee might incur or damage which he might do.[95] Under this construction the entire amount of the bond may be forfeited upon revocation of the principal's license even though no fines or penalties are assessed against the licensee. The forfeiture of the bond, however, is generally

[90] Blum v. Ford, *supra* note 25; City of Fairfield v. Pappas, *supra* note 82.
[91] *In re* Revocation of Marchesani's Liquor License, 122 Pa. Super. 521, 186 Atl. 266 (1936).
[92] Appeal of Samson, 124 Pa. Super. 110, 188 Atl. 82 (1936).
[93] Appeal of Wolf, 115 Pa. Super. 514, 176 Atl. 260 (1935).
[94] Seila's Liquor License Case, *supra* note 82.
[95] Commonwealth v. Eclipse Literary and Social Club, 117 Pa. Super. 339, 178 Atl. 341 (1935); Thomas v. Kind, 222 Wis. 645, 269 N. W. 543 (1936).

held not to occur automatically upon revocation of the license.[96] The tribunal revoking the license generally has a discretionary power to declare the bond forfeited. And it has been held that the omission of a prayer for forfeiture does not prevent the exercise of the power to forfeit the bond when it appears from the evidence that a proper ground exists.[97]

Although it is generally held that the surety has no right to notice of the revocation proceedings or to be made a party thereto,[98] an unappealed from order of revocation entered against a licensee is conclusive against his surety. After the principal's license has been revoked, the surety cannot collaterally attack the revocation order in an action against the licensee to recover the amount which he had paid on the forfeiture of the bond.[99] This, of course, presupposes a valid order of revocation. Thus, in the *De Lucca* case,[100] the court reversed the decree of forfeiture of the surety's bond on the ground that the licensee had not been given proper notice of the revocation proceedings as required by statute and, therefore, the revocation order was void. As a result, there was nothing to which the decree of forfeiture could attach.

An interesting contention was made by the surety in a Missouri case[101] in which the principal's license had been revoked for violation of the liquor laws of the state and the full amount of the bond forfeited. The surety contended that if the bond was a forfeiture bond, as it was construed by the court, the forfeiture of the bond violated the section of the state constitution prohibiting excessive fines and cruel and unusual punishments. The court dismissed the contention on the ground that the liability on the bond is not contingent on a criminal conviction of the licensee.

Inspection of premises without warrant as a condition of license. In order to properly regulate the liquor traffic it is essential that the control authorities have ample power to inspect premises where liquor is sold. Although the federal and state constitutions contain provisions prohibiting unreasonable searches and seizures, it is generally held that this protection may be surrendered by individuals.[102] Thus, a person may consent to having his premises searched without a search warrant and the constitutional provision will not be violated by such search. Because of this, many of the control statutes expressly provide that, by accepting the license issued, the licensee consents to having the licensed premises searched or inspected without a warrant. For example, the Texas statute[103] expressly provides that anyone accepting a license to sell liquor shall do so with express agreement and consent on the part of the licensee that the "Board or its agents shall at all times have the right and privilege

[96] *In re* Revocation of Kosutic's License, 122 Pa. Super. 104, 184 Atl. 683 (1936); West Philadelphia Turn- und Schulverein's Liquor License Case, 129 Pa. Super. 57, 194 Atl. 764 (1937).

[97] West Philadelphia Turn- und Schulverein's Liquor License Case, *supra* note 96.

[98] *In re* Revocation of Kosutic's License, *supra* note 96; De Lucca's Liquor License Case, *supra* note 84.

[99] U. S. Guaranty Co. v. Nobogis, 169 Misc. 31, 6 N. Y. S. (2d) 461 (1938); Commonwealth v. Eclipse Literary and Social Club, *supra* note 95.

[100] *Supra* note 84.

[101] State v. Wipke, 133 S. W. (2d) 354 (Mo. 1939).

[102] Manchester Press Club v. State Liquor Commission, *supra* note 34; Plainos v. State, 100 S. W. (2d) 367 (Tex. 1937).

[103] TEX. ANN. PENAL CODE (Vernon 1936) Art. 667.

of freely entering upon the licensed premises for the purpose of supervising and inspecting said premises, and for the purpose of performing any duties imposed upon them by the Act." The act further provides that no warrant is necessary for the arrest of any persons or for the seizure of liquor unlawfully in the possession of any licensee. Finally, the act makes it a criminal offense to refuse to allow on demand the control board or any representative of the board to make a full inspection of any such place. This provision was held to be constitutional when the court in the case of *Plainos v. State*[104] upheld the conviction of a licensee for its violation. Although other states do not have such express statutory provisions, the same result is achieved by inserting in every application for a license a statement to be signed by the applicant to the effect that permission is given the control authorities to inspect the premises at any time without a warrant.[105]

In a New Hampshire case,[106] a licensee sued to enjoin the enforcement of a provision of the state act similar to the Texas provision on the ground that it was unconstitutional. The court upheld the statute with these comments, "The contention that the regulation is invalid on the ground that it violates the protection of the federal and state constitutions from unreasonable search, confuses beween rights and privileges. No one may sell intoxicating liquor against the state's consent, and if consent is granted, it may be on such terms and conditions as the state attaches thereto. Acceptance of the license is an acceptance of the requirements to be observed by the licensee. The requirements impose the obligation to observe them, since the obligation is one voluntarily assumed in return for the privilege. The uncompelled surrender of a right is not an invasion of the right by the recipient of the surrender, and the right to be secure against unreasonable search and seizure is one that may be yielded. No rule of public policy forbids its waiver."

This privilege of inspection by the control agency under these statutes is not unlimited, however. The court in a Maryland case[107] reversed the conviction of a licensee of the crime of maintaining and operating an establishment for gambling where the conviction was based upon evidence taken from the licensee's apartment, although the apartment was in the same building as the liquor store.

Other questions concerning issuance of licenses. An interesting question has been raised in a few cases concerning the effect of the statutes permitting sale of intoxicating liquors on covenants in leases forbidding such sale on the leased permises. For example, the Pennsylvania statute provided that upon compliance by an applicant with certain conditions, the Board "shall grant and issue a liquor license." Although his lease contained a covenant prohibiting sale of liquor, an applicant for a license contended that this section of the statute rendered such covenant null and void. The Board refused to grant the license on the ground of the covenant and the court on appeal[108] held that the statute did not nullify the covenant or make it illegal and no

[104] *Supra* note 102.

[105] Miller v. State, 174 Md. 362, 198 Atl. 710 (1938).

[106] Manchester Press Club v. State Liquor Commission, *supra* note 34.

[107] Miller v. State, *supra* note 105.

[108] Appeal of Cheris, 127 Pa. Super. 355, 193 Atl. 162 (1937).

license could be issued for such premises unless the restriction had been relinquished by deed. "The mandatory word 'shall' is necessarily limited to an applicant whose deed does not prohibit the sale of liquor."

Where the Federal Government owns land within a state, there are quite frequently problems arising as to the right of the state to require a license of a person who sells intoxicating liquors on such land. The respective rights or jurisdiction of the two governments in such situations depend upon the rights ceded to the Federal Government and the rights reserved by the state in the provisions of the cession statute. In a New Mexico case[109] the defendant operated a liquor store on land, situated in the state of New Mexico, acquired by the United States government, either by purchase or condemnation for reclamation purposes, to which acquisition the state had given its consent. The defendant had a federal license but no license from the state. The state of New Mexico convicted him for possessing alcoholic beverages for purposes of sale without first obtaining a license. The defendant contended that this was not necessary since the property was under the exclusive jurisdiction of the Federal Government. On appeal to the New Mexico Supreme Court, the conviction was affirmed, the court stating, "We hold it to be a principle of law that the State's jurisdiction to tax and regulate the liquor industry within its boundaries will not be presumed to have been legislated away unless such concession can be clearly found in the express statute of concession. This we do not find, . . . the United States government did not accept, nor did the state cede, exclusive jurisdiction over the land acquired for all purposes. It is sufficient to say that the Acts of Cession do not indicate any such exclusive concession as claimed by appellant. The State of New Mexico never ceded its right to regulate or tax the liquor traffic within the state of New Mexico upon lands acquired by the United States government."

But the opposite result was reached by the United States Supreme Court in the case of *Collins v. Yosemite Park and Curry Co.*[110] In this case, the Supreme Court held that the control statutes of California had no application within the limits of the Yosemite National Park, and, therefore, the state could not require a license to sell liquor therein. "The jurisdiction over the Yosemite National Park is exclusively in the United States except as reserved to California, e.g. right to tax. . . . As there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory provisions as are found in the act under consideration are unenforceable in the Park."

ADMINISTRATIVE AND JUDICIAL REVIEW OF CONTROL AUTHORITY ACTION

Administrative review. As was stated before, most of the license system states vest in local authorities power to participate in liquor control. In these states, an appeal from adverse action of the local authorities to the state authority is generally provided by the control statute. In some of these statutes it is further provided that

[109] State v. Mimms, 43 N. M. 318, 92 P. (2d) 993 (1939).

[110] 304 U. S. 518, 58 S. Ct. 1009; *cf.* Crater Lake National Park Co. v. Oregon Liquor Control Commission, 26 F. Supp. 363 (1939).

if the local authority refuses to carry out the order of the state authority's decision on appeal within a given time, such order shall be deemed to be self-executed and shall have the same force and effect as though actually complied with.[111]

Some of the state authorities exercise broad powers when reviewing action of a local control agency on appeal. It has been held that in reviewing the action of the local authority the state agency may take new evidence and make wide investigation into facts.[112] Thus, the state authority is not limited merely to an examination of the record of the local licensing authority. The powers of the state agency on appeal are well illustrated in the opinion of the court in a Rhode Island case.[113] In this case the local authority had granted a license against which a protest was made by an adjoining land owner who applied to the State Commission for review. The chairman of the State Commission was an interested party, being an owner of property adjacent to the licensed premises. On the appeal, the State Commission ordered the local authority to enter on its records a denial of the application, the chairman's vote being necessary for a majority action by the Commission. On a review of the action by writ of certiorari, the court held that the chairman was disqualified to act in this case. In the opinion, the court stated that the act confers broad powers upon the State Commission. "Each member of the Commission is authorized to administer oaths, and the Commission, by subpoena, may summon witnesses and compel them to attend and testify in like manner as either the Supreme or Superior Court. It has power to compel the production of documents, records, etc., which may be necessary by issuing a subpoena *duces tecum,* and also the power to punish for contempt of its processes. . . . In view of the wide powers given the Commission and the nature of the duties imposed upon it by the statute, it is clear that in the exercise of some of these powers it acts as a quasi-judicial body. When sitting as a board of review, it is unquestionably acting in that capacity and, as such, is bound by the same fundamental principles that are binding upon all judicial bodies. Chief among these is that all members thereof shall be free from all personal interest in the matter under consideration."

Judicial review. The question of the right of judicial review of orders and decisions of the liquor administrators has been a perplexing one. The divergent attitudes toward judicial review of decisions of the control authorities are the result of conflicting policy factors. Thus, the statement is made by those who insist on such review that "our tradition of individual freedom presupposes the right of impartial adjudication in controversial matters."[114] It is felt that such matters as granting, denying or revoking licenses and promulgating rules and regulations should not be placed in the hands of administrative tribunals without some supervisory power in the courts. The countervailing policy is the need to deal conclusively with these

[111] Town of Webster v. A. B. C. Commission, 295 Mass. 572, 4 N. E. (2d) 302 (1936); Conover v. Burnett, 118 N. J. L. 438, 193 Atl. 685 (1937).

[112] Boginski v. Alcoholic Beverage Commission, 4 Atl. (2d) 265 (R. I. 1939).

[113] Clark v. A. B. C. Commission, 54 R. I. 26, 170 Atl. 79 (1934).

[114] HARRISON AND LAINE, *op. cit. supra* note 9, at 90.

matters in the first instance. In support of this view, it is said that the liquor authority's familiarity with necessary facts renders it the best judge. Also, appeals to courts provide many opportunities for the sale of liquor by undesirable persons during the period pending court action.

Most of the states provide for an appeal either to specified courts or to courts of general jurisdiction.[115] However, some of the statutes have omitted any mention of a right of review.[116] Other statutes have definitely denied the right of appeal by expressly providing that there shall be "no appeal" from the action of the control authorities or that such action "shall be final."[117] At least one statute has provided that the decision of the control authority on questions of fact shall be final.[118] In some states in which both local and state authorities have licensing power, the statutes provide for appeal from a decision of the local board to the state authority. But here again the action of the state authority may be appealed from in some states and not in others.[119] In general, the necessity for exhausting administrative remedies before turning to the courts for relief is recognized in this field as elsewhere.[119a]

It has been held in an Ohio case[120] that a statute providing that the action of the state authority in revoking a license shall be final is not a violation of the due process clause of the Federal Constitution. In this case, the local authority revoked a license. The licensee appealed, under the statute, to the state board which reviewed the revocation and upheld the action of the local authority. The licensee then brought a writ of mandamus proceeding to compel the Board to rescind the order of revocation and to reinstate the license on the ground that the provision that the decision of the state board should be final violated the Fourteenth Amendment of the United States Constitution. The court denied the writ and declared the provision to be constitutional. The pertinent language of the court was, "Where the authority to hear and determine controversies which do not involve the exercise of judicial power is conferred by the legislature upon the executive or administrative branch of state government, with finality of determination, there is no denial of due process of law under the State or Federal Constitution; so if the power to be exercised is purely executive or administrative, no recourse to the courts by appeal or error need be provided to assure the constitutional validity of the empowering act. . . . Neither the granting nor the revoking of a license by a state board under authority conferred by the legislature is an exercise of judicial power."

If the right of judicial review is provided for by statute, the control authorities cannot make their action final by refusing to receive any application for licenses. In holding that the authority must receive applications and pass upon them, the court in a New York case[121] said, "The fact that the city Board may regard the per-

[115] CULVER AND THOMAS, *op. cit. supra* note 3, at 42 and Table X.

[116] *Ibid.*

[117] Appeal of McGettigan, 131 Pa. Super. 280, 200 Atl. 213 (1938).

[118] Marsh v. Alcoholic Beverage Commission, 54 R. I. 57, 169 Atl. 747 (1933).

[119] CULVER AND THOMAS, *op. cit. supra* note 3, Table X.

[119a] See note 140 *infra*.

[120] State *ex rel.* Zugravu v. O'Brien, *supra* note 64.

[121] Wilson v. Quinn, 253 App. Div. 403, 2 N. Y. S. (2d) 6 (1938).

formance of its duty as futile is no legal excuse. Such omission in effect operated as a denial of the right of judicial review of a determination of the Liquor Authority upon petitioner's application for a license."

(A) On appeal. The scope of the review of the courts on an appeal from the licensing authority is generally limited. In general the courts seek only to determine whether or not the licensing authority had jurisdiction to act and if that action was arbitrary or capricious.[122] The reason for this is set out in the case of *Van DeVegt v. Board of Commissioners.*[123] "Since the local authority is peculiarly fitted to determine whether, under all surrounding circumstances, the license should be granted, the court will not hold their action arbitrary where such action is based on evidence from which reasonable men might draw different conclusions." The Connecticut control statute provided that if the Superior Court on appeal finds that both place and person are suitable it shall order a license issued. However, in a case involving this provision,[124] the Supreme Court of Errors said, "The court holds that the farthest the Superior Court can go is to review the action of the Commissioners to determine whether or not they had acted legally and in the exercise of reasonable discretion. Hence the act of the Commissioners must be sustained unless it appear that it acted arbitrarily."

The Texas statute provides that "An appeal from any order of the Board or Administrator cancelling or suspending a license may be taken to the District Court of the County in which the aggrieved licensee may reside. The proceeding on appeal shall be against the Board alone as defendant and the trial shall be *de novo* under the same rules as ordinary civil suits" except that "neither party shall be entitled to a jury."[125] The latter provision dispensing with a jury has been upheld as not violating the state constitution.[126] Although this statute provides for a trial *de novo* on appeal, the scope of the court's inquiry has been construed as follows,[127] "On appeal from the Board's order, the District Court cannot hear testimony not produced before the Board. The Board's decision that the license should be revoked is binding upon the District Court if supported by substantial testimony and if not determined to be arbitrary or capricious." Another interesting feature of this statute is that it makes all notices, orders, rules, etc. of the Board *prima facie* valid, which necessarily places the burden of proof upon the one complaining.[128]

(B) Mandamus. Aside from statutory provisions for appeal, other devices are used in an attempt to obtain a review of the action of the control authority. The most common of these is a writ of mandamus proceeding, generally to compel the

[122] Gwiazda v. Borgin, *supra* note 14; Skarzynski v. Liquor Control Commission, 122 Conn. 521, 191 Atl. 98 (1937); *In re* Kulack, 254 App. Div. 826, 5 N. Y. S. (2d) 220 (1938).

[123] *Supra* note 16.

[124] Skarzynski v. Liquor Control Commission, *supra* note 122.

[125] TEX. ANN. PENAL CODE (Vernon 1936) Art. 666-14.

[126] Texas Liquor Control Board v. Jones, 112 S. W. (2d) 227 (1937).

[127] Texas Liquor Control Board v. Floyd, 117 S. W. (2d) 530 (1938).

[128] Texas Liquor Control Board v. Marine Exchange Club, *supra* note 70.

authority to issue a license.[129] Since the right to a license to sell liquor is held to be a privilege, the mandamus proceeding is generally unsuccessful.[130] The language used by the courts is usually to the effect that one is not entitled to a writ of mandamus unless it appears that he has a clear legal right to have performed the particular act.[131] And, although a business is legalized, it does not follow that there is an absolute right to conduct such business where it is of a harmful type.[132] The office of this writ is aptly stated by the court in the case of *Reichelderfer v. Johnson*.[133] "Mandamus will not issue where its effect will be to dictate to an officer in the exercise of a discretionary function, or to serve the purpose of writ of error. Only where a mandatory ministerial duty is plainly imposed upon the officer will mandamus lie against him and, since the earliest cases, it has been held that where an officer's action involves the exercise of his discretion in the construction and interpretation of a statute, mandamus will not issue to compel him to act upon one construction rather than another. Mandamus will not lie if the construction of the officer is a possible one, and there is room for an honest difference of opinion."

In accordance with these principles, a writ of mandamus has been granted in two types of situations arising under the licensing systems. The first is where the control authority refuses to exercise the powers vested in it.[134] For example, the Georgia control statute placed upon the governing authority of the county the duty to regulate the sale of liquor where the local option vote was affirmative. After such affirmative vote in one case the commissioners passed a resolution to grant no licenses for the county. A writ of mandamus was granted by the court to compel the commissioners to perform their duty under the act and fix the conditions under which licenses would be granted.[135] Said the court, "The act authorizes discretion in the regulation of the sale, not the use of discretion in determining whether or not liquor shall be sold in the county. Where an officer is vested with discretion, the courts will not by mandamus direct in what manner he shall exercise that discretion, but they may compel the officer to exercise his discretion."

The other situation in which mandamus will lie is where the licensing authority has acted contrary to the provisions of the control statute. Thus, where the license is granted within 300 feet of a church when the statute forbade the sale of liquor within that distance from a church, school or hospital, the church was granted a writ of mandamus to compel the revocation of the license.[136] Likewise, where the number

[129] Heuston v. Gilman, 98 Colo. 301, 56 P. (2d) 40 (1936); Levi v. State, 136 Fla. 806, 187 So. 600 (1939).

[130] Ellison v. Doyal, 182 Ga. 803, 187 S. E. 11 (1936); State v. Arundell, 200 Minn. 305, 273 N. W. 817 (1937); Silberglied v. Mulrooney, *supra* note 14.

[131] Hodges v. Kennedy, *supra* note 43; Phillips v. Head, *supra* note 17.

[132] Thielen v. Kostelecky, *supra* note 43; Heuston v. Gilman, *supra* note 129.

[133] 63 App. D. C. 334, 72 F. (2d) 552 (1934).

[134] Fulton Restaurant, Inc. v. Quinn, 300 N. Y. Supp. 779 (1937); Reckler v. Quinn, 254 App. Div. 710, 4 N. Y. S. (2d) 374 (1938).

[135] Thomas v. Ragsdale, *supra* note 56.

[136] Board of Trustees of Leland Stanford Univ. v. State Board of Equalization, 37 P. (2d) 84 (Calif. 1934); State v. Fuller, 133 Fla. 554, 182 So. 888 (1938).

of licenses which the authority is permitted to issue is definitely fixed, mandamus will lie to compel the revocation of those licenses issued in excess of the fixed number.[137]

(C) Certiorari. Instead of providing for an appeal from the action of the control authority, some statutes provide that the action may be reviewed by writ of certiorari.[138] However, the most frequent use of the writ of certiorari has been under those statutes which provide that the action of the licensing authority shall be final. The courts have taken three attitudes toward the availability of this writ where no provision for appeal to a court has been made. Some courts hold that a statute making the action of the control authority final does not affect the right of the court to issue a writ of certiorari in order to determine, from an inspection of the record, whether or not the authority exceeded its jurisdiction and for the purpose of correcting errors apparent on the face of the record.[139] Other courts hold that if the control statute provides for an appeal from the local to the state authority, whose decision is final, certiorari is not available to review the action of the local board.[140] This is merely an application, of course, of the general principle that administrative remedies must be exhausted before seeking judicial review. In a New Jersey case,[141] the court explains this position thus, "The doctrine of the general availability of the court's prerogative writ when no other remedy exists, has no application in cases when the Legislature has provided a specific remedy and a special agency for its prompt administration. It is a sound exercise of discretion, to say the least, for the courts to forward rather than to thwart such legislative policy, and this can be done only by denying allocatur where the statutory review has not been had, reserving the use of the prerogative writ for review of such statutory tribunals, rather than permitting its use to their disparagement. The discretionary nature of the writ permits, if it does not require, us to give controlling effect to these considerations."

The third attitude of the courts is that action of the licensing authority in denying or revoking a license is not reviewable by certiorari. This was the attitude of the court in a Georgia case[142] in which there was a petition for a writ of certiorari after the Commission had revoked a license. The court stated that, since the selling of alcoholic beverages is a mere privilege, "the revocation of a permit granting such a privilege either with or without a hearing, or for cause or without cause, is therefore not a judicial act and is not reviewable by certiorari."

(D) Injunction, Prohibition and Habeas Corpus. Writs of injunction have been used quite frequently to test the authority of the control agency to revoke licenses and promulgate regulations.[143] These actions are usually brought on the theory that

[137] Pettengell v. A. B. C. Commission, *supra* note 83.

[138] Marwill Liquor Store v. State Liquor Authority, 155 Misc. 489, 280 N. Y. Supp. 601 (1935); Gelces v. State Liquor Authority, 154 Misc. 517, 278 N. Y. Supp. 328 (1935).

[139] Portuguese-American Ind. Social Club v. Costello, *supra* note 12; Walker v. Womack, 181 Okla. 34, 72 P. (2d) 510 (1937).

[140] Matthews v. City of Asbury Park, 113 N. J. L. 205, 174 Atl. 213 (1934).

[141] *Ibid.*

[142] Acree v. Ragsdale, 60 Ga. 675, 4 S. E. (2d) 708 (1939); *cf.* Marsh v. Alcoholic Beverage Commission, *supra* note 118.

[143] Marsh and Marsh v. Carmichael, *supra* note 76; Fylken v. City of Minot, *supra* note 7; Coady v Leonard, *supra* note 5.

the statute under which the authority is acting is unconstitutional. In an attempt to obtain a review of the action of the licensing agency in revoking a license, an action is frequently brought to enjoin the agency from interfering with the plaintiff's business after the order of revocation has been rendered.[144] Quite similar to the writ of injunction is the writ of prohibition which is sometimes used to determine if the control agency acted in excess of its authority.[145] This writ is generally used to contest regulations made by the control authority, the contention being that the regulations were not within the scope of power vested in the control agency by the statute. Finally, where violation of provisions of the statute or of regulations of the board is made a criminal offense, the writ of habeas corpus has been used by one convicted of such violation to test the validity of the statute or regulation.[146]

Is the statutory method of review exclusive? Since most states provide by statute for a review of the control authority's action, the question has arisen as to whether that method of review is exclusive of all others. Very few cases involving this question seem to have arisen in this field.[147] However, it has been held that the procedure for review provided by the control statute is the exclusive remedy. Thus, the Kentucky act provided for an appeal from the orders of the control board to a specified court. On the ground that the statutory appeal was the exclusive method of review, the Court of Appeals dismissed an action for a mandatory injunction brought by one who had not appealed from the action of the board.[148]

Closely related to the question of whether the statutory method of review is exclusive is the question of how results of local option elections may be reviewed. In a Texas case,[149] the plaintiff contested the validity of such an election by a mandamus action against the State Liquor Board to compel issuance of a license for premises located within the local option unit. The court refused to grant the writ holding that the proper method to attack the election was by an election contest as authorized by statute, which was exclusive, and the method used in this case was a collateral attack upon the election which could not be maintained. However, in New York an attack upon a local option election by suit to enjoin the sale of liquor by one who had been granted a license after the election was successful.[150] In this case the court said that the State Liquor Authority had no judicial power and, therefore, had no jurisdiction to determine the validity of a local option election. "By granting the license, the Authority in effect made a judicial determination of the validity of the election."

[144] Blum v. Ford, *supra* note 25; McKown v. City of Atlanta, *supra* note 41.

[145] Alexander v. Graves, 178 Miss. 583, 173 So. 417 (1937); State *ex rel.* Stewart v. Dist. Court, 103 Mont. 487, 63 P. (2d) 141 (1936); Sesselberg v. Schoenbeck, *supra* note 32.

[146] State *ex rel* Floyd v. Noel, *supra* note 52.

[147] Martin v. Board of Council, 275 Ky. 142, 120 S. W. (2d) 76 (1938); Marwill Liquor Store v. State Liquor Authority, *supra* note 138.

[148] Martin v. Board of Council, *supra* note 147.

[149] Talley v. Benson, 96 S. W. (2d) 94 (1936). An attempt to attack another local option election in the same state by injunction proceedings met the same fate: Akers v. Remington, 115 S. W. (2d) 714 (1938).

[150] Wall v. Great A. & P. Tea Co., 162 Misc. 635, 295 N. Y. Supp. 360 (1937).

Stay of order pending review. Where judicial review of the action of the licensing authority is provided for, the question of whether the original order of the authority should go into effect upon its issuance or be stayed pending review raises difficult problems which few of the liquor statutes have attempted to solve. If the court grants a stay of the order, an undesirable person may continue to do business for months after the order was issued. On the other hand, if the court should reverse the liquor authority's decision and the authority's order has been in effect for possibly months, the trade of the licensee may have been ruined. Some of the states, however, have attempted to meet this dilemma by providing that the court of appeal may grant a stay of the order not exceeding a certain period of time.[151] Thus, the New York Act provides that no stay shall be granted except on notice to the liquor authority and for a period not exceeding thirty days.[152] In the case of *Yacht Club Catering v. Bruckman,*[153] the court refused to grant a further stay of the order making these comments on the statute: "To insure that the Liquor Authority acts lawfully and to protect the rights of individuals, the determination of the Liquor Authority is subject to review by the court. Irreparable damage to the individual might result if, pending the determination of the court upon such review, an erroneous or arbitrary order of the Liquor Authority were enforced. On the other hand, respect for the law is weakened to the public detriment whenever the state is delayed, even by legal process, in stopping any act which is in fact unlawful and which has been declared unlawful by the public authority vested with power to determine its legality . . . the Legislature has decided to impose that limitation, and the courts may not disregard it or give to the statute a construction which would thwart the legislative intent. When it imposed that limitation it did not intend that the limitation might be evaded by successive stays."

Providing for such a limited stay protects the rights of the licensee affected and at the same time meets, to some extent at least, the argument against judicial review that an undesirable person may continue business for months pending review. However, the effectiveness of such a limited stay is very largely dependent upon the facility with which review of the action of the licensing authority may be obtained in the courts. If it is a matter of months before the appeal can be considered by the court, the stay is of little value as a protective measure for the licensee.

While the great variety in the licensing laws themselves makes extensive generalization hazardous, it seems obvious, that in the great majority of cases in this field the courts have not been inclined to interfere with legislative pronouncement or administrative activity. This makes the responsibility of the licensing agencies all the more grave, and, from the public standpoint, it becomes all the more important to insist on a quality of administrative personnel capable of exercising these comparatively unfettered powers.

[151] CULVER AND THOMAS, *op. cit. supra* note 3, at 49.
[152] NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW, §121.
[153] 267 N. Y. 44, 11 N. E. (2d) 345 (1937).

CONTROLS OVER LABELING AND ADVERTISING OF ALCOHOLIC BEVERAGES

WALLACE A. RUSSELL*

The time has passed when an inveterate toper could excuse his addiction to the bottle by relying upon advertising statements that his particular "tonic" "aids digestion, stimulates and enriches the blood, invigorates the brain, builds nerve tissue, tones up the heart, and prolongs life." He can no longer point to assurances on the bottle that the contents constitute a cure for pulmonary conditions, stomach complaints, la grippe, typhoid, and other low fevers and would render his system, if he drank enough, immune to various diseases, and, if applied externally, would even cure ulcers.[1] Indeed regulation of labeling and advertising of alcoholic beverages has become an outpost on the advancing frontier of protection of the unwary consumer.

Prior to the repeal of Prohibition, no agency of the Federal Government was provided with statutory authority to regulate the labeling and advertising of alcoholic beverages specifically. Such control as existed in this field was exerted by agencies already overburdened with the task of supervising and correcting practices in the whole range of commerce, such as the Federal Trade Commission and the Food and Drug Administration.[2] After a long and bitter battle, the question of defining "whisky" under the Food and Drug Act was finally brought before President Taft, who decided, on December 27, 1909, that the term "whisky" had traditionally included all potable liquors distilled from grain. This all-embracing definition, of course, afforded no real standard.[3]

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[1] The label statements referred to are drawn from press release of the Food and Drug Administration, dated Feb. 24, 1934. Other examples of medicinal claims appearing in advertisements of liquor before Prohibition are: "America's greatest medicine," "Better than all other medicines combined"; "Nursing mothers—build up your strength and the health of your infant by taking an invigorating stimulant"; "Coughs, colds, grippe, asthma, bronchitis, and consumption speedily cured"; "Good for the kidneys—that concentrated essence of the juniper berry known in its purest form as Gin"; "Many trained nurses advise their patients to order strengthening wines, whiskies, and cordials."

[2] The activities of these agencies in connection with the labeling and advertising of alcoholic beverages are discussed *infra* pp. 655-660.

[3] The whisky controversy in this country and in England is ably reviewed in a memorandum prepared by E. B. Bowers, an attorney in the former Federal Alcohol Control Administration, entitled *Memorandum on the "What is Whisky" Controversy*. See also THORNTON, LAW OF FOOD AND DRUGS (1912) 450-461.

While isolated labeling provisions appeared in the internal revenue laws and regulations, in the main these required labeling information identifying the product for tax purposes and, in most cases, applied to bulk containers which the inquisitive consumer would never see.[4] There was, however, one important exception—in 1897 Congress passed the Bottling in Bond Act.[5] This statute permitted certain spirits to be bottled in bond under government supervision, and provided for use on the bottle of a particular kind of internal revenue stamp which served to identify such spirits. Only spirits which had remained in bond for four years (now storage in wooden containers is required), which were produced in one distilling season by the same distiller at the same plant, and reduced to not less than 100° proof could be bottled in bond. Thus, bottled in bond whisky was the only alcoholic beverage upon which a consumer could rely at all, and even here the protection afforded was extremely limited. Moreover, bottled in bond products were relatively expensive and the fact that wholesalers and retailers could secure whisky in barrels and bottle it themselves left the door wide open to all sorts of frauds, the discovery and correction of which were extremely difficult. The fact that fraud was rampant in this field was well known,[6] and the theory of *caveat emptor* still prevailed in spite of isolated attempts to require more informative labeling. During Prohibition mislabeling was stimulated to a degree undreamed of before and many through bitter experience became familiar with the attendant evils.

The repeal of Prohibition occurred on December 5, 1933, when Congress was not in session, and the provisions of the National Industrial Recovery Act,[7] relating to the regulation of industry under codes of fair competition, were seized upon as a means of controlling the renascent industry in order to prevent a recurrence of the evils which were to a large extent responsible for the advent of Prohibition and the Federal Alcohol Control Administration was established by executive order.[8] The codes for the various branches of the alcoholic beverages industry each contained provisions with respect to labeling and advertising.[9] With some slight variations of language, these provisions prohibited industry members from publishing false advertisements and selling misbranded products. Advertisements were deemed to be false if untrue in any particular, or if directly or by ambiguity, omission, or inference they tended to convey a misleading impression. Products were deemed misbranded: (1) if not labeled in compliance with the Federal Food and Drugs Act, (2) if the container was made, formed, or filled so as to mislead the purchaser, or if

[4] *E.g.*, Bur. Int. Rev., Gauging Manual (1938 ed.) ¶¶42, 48, 56-62, 73-86, and 145 contain requirements with respect to the marking of the barrel heads of bulk spirits.

[5] 29 STAT. 626 (1897) as amended by 49 STAT. 1944 (1936), 26 U. S. C. §§2903, 2904 (Supp. V 1940).

[6] President Taft's Whisky Decision, December 27, 1909, contained the following statement: "It is undoubtedly true that liquor trading has been disgracefully full of frauds upon the public by false labels. . . ."

[7] 48 STAT. 195 (1933).

[8] Exec. Order No. 6474, Dec. 4, 1933.

[9] For these provisions see Distilled Spirits Code, art. V, §§1, 2; Distilled Spirits Rectifying Code, art. V, §§1, 2; Alcoholic Beverages Importing Code, art. V, §§1, 2; Brewing Code, art. IV, §§1, 2; Wine Code, art. V, §§1, 2; Alcoholic Beverage Wholesale Code, art. V, §§1, 2, art. VI, §§1, 2.

the contents fell below standards of fill to be prescribed by regulation, (3) if represented as products covered by a standard of identity prescribed by regulations and if they did not conform to such standard, (4) if represented as conforming to a standard of quality prescribed by regulation and if their labels failed to state, if required, such standard correctly, or if they fell below such standard (no regulations were, however, ever issued prescribing standards of quality), and (5) if not labeled in conformity with regulations prescribed.

On February 6, 1934, the Federal Alcohol Control Administration approved a five-page set of distilled spirits labeling regulations of a general nature. Experience, however, quickly proved that any attempt to regulate the labeling of alcoholic beverages by the interpretation of general regulations was doomed to failure. After the issuance of several amendments, a multitude (115) of interpretations and special regulations dealing with particular subjects, on May 13, 1935, the regulations were reissued in pamphlet form, covering 32 pages.[10] A review of the provisions of these regulations is unnecessary since they form the background for the regulations now in force. Almost immediately thereafter, the legislative props upon which the Federal Alcohol Control Administration and its regulations rested were knocked out by the decision of the Supreme Court in the *Schechter* case on May 27, 1935.[11]

Although the Federal Alcohol Administration Act[12] was not passed until August 29, 1935, the disintegration of labeling and advertising control in the interim was prevented by the fact that the Bureau of Internal Revenue had already adopted, and was enforcing, some of the Federal Alcohol Control Administration labeling requirements under its authority to control the traffic in containers of distilled spirits. On June 15, 1935, the Bureau's Regulations No. 13[13] were amended to require that all liquor bottles should bear most of the mandatory information theretofore required under the Federal Alcohol Control Administration's regulations (T.D. 4560). Thus distilled spirits labeling controls were continued during the consideration of new legislation by Congress. The new statute was based to a large extent on provisions of the codes of fair competition and the control over labeling and advertising was retained.

Perhaps the best summary of the purposes behind these labeling and advertising provisions of the statute appeared in the statement of Joseph H. Choate, Jr., former Director of the Federal Alcohol Control Administration, at the hearings before the Ways and Means Committee of the House of Representatives:[14]

"Now, the provisions of this bill show that the purpose was to carry that regulation into certain particular fields in which control of interstate commerce in liquors was paramount and necessary. The purpose was to provide such regulations, not laid down

[10] F. A. C. A., Regs. Relating to False Advertising and Misbranding of Distilled Spirits, May 13, 1935.
[11] 295 U. S. 495 (1935).
[12] 49 STAT. 977 (1935) as amended by 49 STAT. 1152 (1936) and 49 STAT. 1964 (1936), 27 U. S. C. §201 (Supp. IV 1938).
[13] U. S. Treas. Bur. of Int. Rev., Reg. 13 (Traffic in Containers of Distilled Spirits), 26 CODE FED. REG., c. 1, pt. 175.
[14] *Hearings before the Committee on Ways and Means on H. R. 8539*, 74th Cong., 1st Sess. (1935) 10.

in statute, so as to be inflexible, but laid down under the guidance of Congress, under general principles, by a body which could change them as changes were found necessary.

"Those regulations were intended to insure that the purchaser should get what he thought he was getting, that representations both in labels and in advertising should be honest and straightforward and truthful. They should not be confined, as the pure-food regulations have been confined, to prohibitions of falsity, but they should also provide for the information of the consumer, that he should be told what was in the bottle, and all the important factors which were of interest to him about what was in the bottle."

A further statement of the purposes of this legislation appears in the Report of the Ways and Means Committee on the proposed legislation:[15]

"The labeling and advertising provisions (sec. 5(e) and (f)) prohibit the use of interstate channels when labeling or advertising of distilled spirits, wine, or malt beverages does not conform to regulations, with the force and effect of law, prescribed by the Administrator. Definite standards are laid down for these regulations. The regulations are not only required to prohibit labeling and advertising that is false, misleading, obscene, or indecent, or that disparages competitors' products, but must also provide for the prevention of deception of the consumer with respect to the product or its quality. They must also prohibit, regardless of their truth, statements relating to age, manufacturing process, analyses, guaranties, and scientific or irrelevant matters that the Administrator finds likely to mislead the consumer, and must make provision for informing the consumer adequately as to the identity and quality of the product, its alcoholic content, the net contents of the package, and the person responsible for the package or the advertisement."

Conforming to these statements,[16] the statute contemplates not only the elimination from advertising and labeling material of all statements that are deceptive or misleading, but also the furnishing of information to the consumer which will ad-

[15] H. R. REP. No. 1542, 74th Cong., 1st Sess. (1935) 12.

[16] The legislative standards contained in the Act read: ". . . such regulations, to be prescribed by the Administrator, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Administrator finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are hereby prohibited unless required by State law and except that, in the case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or, in the case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; and (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization. . . ." §5(e), FEDERAL ALCOHOL ADMINISTRATION ACT. See §5(f) for similar standards applicable to advertising regulations.

vise him of the identity, quality, net contents, alcoholic content (except in the case of malt beverages or of wine containing not more than 14% of alcohol by volume), the name of the person responsible for the product, and the amount and source of the neutral spirits, if any, in the product. The statute thus went much farther in positive demands upon producers that they advise the public of the nature of their products than any earlier legislation with respect to liquor or any other product not actually dangerous.

Filling in the details under these legislative standards, the Federal Alcohol Administration issued regulations governing the labeling and advertising of wine, distilled spirits, and malt beverages, respectively. These regulations will be considered in detail later. It should perhaps be noted here, however, that in the only cases in which the regulations have been attacked, the statute and the regulations have met with judicial approval. In *Arrow Distilleries, Inc. v. Alexander*,[17] Circuit Judge Treanor, in overriding the company's argument that this section of the act represented an unconstitutional delegation of legislative authority, said:[18]

> "Section 5(e) of the Act prescribes a reasonably definite standard to guide the Administrator in prescribing labeling regulations. This section provides for such label regulations as will prevent deception of the consumer with respect to products or the quantity or quality thereof, and such as will prohibit, irrespective of falsity, statements likely to mislead the customer. In general, the authority of the Administrator is limited to such regulatory action, with respect to labeling, as will protect consumers from false, misleading or inaccurate representations and protect competitors from unfair trade practices in the use of labels. Decisions of the Supreme Court have upheld administrative standards which clearly are not more definite or restrictive than the one involved here" (citing cases).

In addition to providing for the issuance of labeling regulations, the act also establishes, as a means of preventing the introduction of mislabeled beverages into interstate commerce, a label approval system, and prohibits anyone subject to its provisions from domestically bottling or withdrawing from customs custody in bottles any alcoholic beverage without first applying for and securing a certificate of label approval (or, if upon application he shows that the product bottled is not to be introduced into interstate or foreign commerce, a certificate of exemption from label approval) covering the labels to be placed thereon. In the case of distilled spirits, which, under internal revenue law, may only be bottled under the supervision of government officers, those officers are directed by the statute to withhold their release from the bottling plant unless the appropriate certificates have been obtained. Similar duties are imposed upon customs officials in the case of all imported alcoholic beverages. The labeling provisions are therefore double-barreled—they not only prohibit producers, importers, and wholesalers of alcoholic beverages from introducing products into interstate commerce unless labeled in conformity with the regulations,

[17] 109 F. (2d) 397 (C. C. A. 7th, 1940) *cert. denied*, 310 U. S. 646 (1940).

[18] See also Jameson & Co. v. Morgenthau, 25 F. Supp. 771, at 774 (D. C. 1938), *decree vacated on other grounds*, 307 U. S. 171 (1939).

but also prohibit them from bottling or importing the same unless they have first secured the appropriate certificates evidencing the correctness of the labels. Since the passage of the act more than 495,000 applications for label approval or exemption have been acted upon.[19]

At first glance this system appears so watertight that no mislabeled merchandise could reach the public. There are, however, several leaks inherent in the system which it has, up to the present, been impossible to stop. The first and most serious of these results from the fact that the issuance of a certificate of approval for a label in itself furnishes no assurance that the bottler will not apply the label to products which do not conform thereto. The improper use of correct labels can only be prevented by supervision of the actual bottling operation. In the case of domestic distilled spirits, since bottling is supervised by government officers, the officer can, and does, make spot checks to be sure that the product does in fact correspond to the statements on the label, and can refer to the government records, which under internal revenue laws must be kept, and which contain all the important facts concerning the spirits being bottled. In the case of imported beverages, customs officers also make spot checks of the product and can examine the certificates of origin, age, and identity which are issued by appropriate officials of foreign governments, and which are required under the act and regulations to accompany certain imported products. Where, however, the bottling is unsupervised, as in the case of wine or malt beverages bottled by wholesalers, labels perfectly correct in themselves may be placed upon products quite dissimilar, and such a practice is usually discovered only by an examination of the product after introduction into commerce.

The second flaw results from the fact that the certificate system does not apply to retailers who can, unless prohibited by state laws, receive wine and malt beverages in bulk and bottle the same under unapproved labels.

Thirdly, in the case of malt beverages, the labeling regulations and the certificate system can, under a specific provision of the statute,[20] only apply in the event the law of the state into which the malt beverages are shipped contains provisions similar to those in the federal statute and regulations.

The fourth and last leak which might permit the flow of mislabeled merchandise results from the fact that these regulations cover only such liquor as is introduced into commerce under certificates of label approval, while certificates of exemption

[19] F. A. A. ADMR., ANN. REPS. (1936-1939).

[20] This provision reads: "In the case of malt beverages, the provisions of subsections (e) and (f) shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof." §5(e), FEDERAL ALCOHOL ADMINISTRATION ACT. The former Administrator repeatedly requested Congress to repeal this provision of the statute, but no action has as yet been taken, and so the labeling and advertising of malt beverages which are shipped into states that have not adopted the federal regulations remain completely unsupervised. ANN. REPS. (1936-1939).

from label approval may be obtained to cover the labels on goods bottled for sale within the same state. This last gap has, however, been to a large extent caulked as a result of a number of measures. The issuance of certificates of exemption is conditioned upon the bottler's agreeing to state on the label that the beverages are "For intrastate sale only" (in the case of distilled spirits) or "Bottled for sale in——— only" (in the case of wines).[21] Furthermore, distilled spirits, even when bottled for intrastate sale, must be labeled in compliance with the requirements of Regulations 13 of the Bureau of Internal Revenue and certificates of exemption for distilled spirits not conforming to these regulations are therefore denied. Moreover, it has been the practice, as a matter of cooperation with the state agencies, to return applications for such certificates for distilled spirits and wine labels from bottlers located in states which have adopted as state regulations the federal bottling requirements.[22]

Summarizing the administrative procedure under the certificate system, a bottler or importer of alcoholic beverages who desires to make use of a new label or change a label formerly used, forwards the same to the Government, affixed to an application for a certificate of label approval. The label and the application are carefully reviewed and, if it is found that they conform to the requirements of the regulations, a certificate of approval is then issued. If, however, the label does not meet these requirements, a certificate of disapproval is issued, bearing on its face a statement of the corrections and changes which will have to be made in the label before it can receive approval. The label may then be corrected and resubmitted for approval. The certificate of approval when obtained authorizes the release of alcoholic beverages bearing identical labels from customs or their withdrawal from the bottling plant.

The law (§5(e)) also prohibits anyone from altering, mutilating, or removing any label on alcoholic beverages introduced in interstate or foreign commerce or after shipment therein except as authorized by the Government for the purpose of complying with federal labeling requirements or with state law. This provision is necessary to prevent the application of false labels as soon as the product has crossed the state line.

Recourse to the district courts is provided for in the statute for persons who want to question the Government's action in denying applications for certificates (§5(e)). A violation of the labeling or advertising provisions of the statute, or of regulations thereunder, may result in the suspension or revocation (if a second offense) of the permit to engage in business (§§4(d) and (e)), or criminal proceedings involving a maximum fine of $1,000 for each offense (§7).

[21] This requirement has been supported on the theory that the applicant's using the phrase is a reasonable step in "showing to the satisfaction of the Administrator" that the product will not enter interstate commerce. The prospective purchaser is, of course, notified by this label statement that the product is barred from interstate channels. Certificates of exemption from label approval are not issued for malt beverages in view of their peculiar status under the Act.

[22] The provisions of Int. Rev. Reg. 13 (*supra* note 13 and related text) with respect to mandatory information on labels are in all major respects the same as those of F. A. A. Reg. 5. When applications for certificates of exemption are returned because of similarity of state requirements the applicant is informed that the issuance of the certificate would serve no useful purpose and is advised to correct the label to conform to the joint federal and state requirements and obtain a certificate of label approval.

The labeling and advertising regulations can, under the act, be issued only after "reasonable public notice" and "opportunity for hearing" (§5(e)). These hearings are held after notice to members of the industry, state officials and others who may be interested in the subject matter.[23] In the past the hearings have been considered non-partisan and similar to legislative hearings held by congressional committees for the consideration of proposed legislation. All testimony and exhibits of a scientific or factual nature are received; witnesses are, however, not sworn and no cross-examination has been permitted, since this would unnecessarily prolong the hearing, overburden the record, and would detract from the orderly conduct of the hearing.[24] Any interested party may, however, study the record and file a brief or other material of an argumentative nature in connection therewith. At the close of the hearing the record is carefully studied, summarized, and analyzed before any regulations are issued.

Three sets of regulations deal respectively with the labeling and advertising of wine, distilled spirits, and malt beverages.[25] They follow the same general plan and many provisions thereof are identical. The wine and distilled spirits regulations contain elaborate and detailed standards of identity[26] and not only is a product which does not conform to a standard prohibited from bearing the designation for that standard, but also all products which do conform to a standard are required to bear its designation.[27] Provision is made for the designation of a product for which no standard is prescribed, in accordance with the trade understanding thereof, if any, or by a distinctive and fanciful name with a statement as to its composition.

In general, the regulations require labels to bear the brand name of the product, the class and type thereof, the name and address of the producer, importer, or bottler, the alcoholic content (except in the case of certain wines and malt beverages), and the net contents.[28] In the case of blends of foreign and domestic wines where the label refers to the foreign wine, the exact percentage thereof must also be stated;[29]

[23] The notices of hearing contained either a form of proposed regulation or a short summary of the proposal to be considered. The hearings on the original regulations were held as follows—on the proposed wine regulations, Nov. 22, 1935; on the proposed distilled spirits regulations, Oct. 31, 1935; on the proposed malt beverage regulations, Jan. 7, 1936. Since the promulgation of these regulations, the Administration has held a number of public hearings to consider proposed amendments to the regulations.

[24] At the hearing held April 27, 1939, to consider a number of proposed amendments to the distilled spirits labeling and advertising regulations, representatives of the Distilled Spirits Institute and the National Association of Alcoholic Beverage Importers, Inc., strongly urged that witnesses be sworn and that cross-examination be allowed. The Administrator denied these requests but permitted the submission of written questions which he himself asked if he considered them appropriate. He took the position that questions relating to the conduct of the hearing were properly matters resting on his own discretion.

[25] F. A. A., Regs. 4 (Relating to Labeling and Advertising of Wine), 5 (Relating to Labeling and Advertising of Distilled Spirits), and 7 (Relating to Labeling and Advertising of Malt Beverages). 27 CODE FED. REG., pts. 4, 5, 7. Although the Federal Alcohol Administration was abolished under the President's Third Reorganization Plan, issued pursuant to the Reorganization Act of 1939, 53 STAT. 561, 5 U. S. C. §133 (Supp. V 1940), the functions of the Administrator were transferred to the Alcohol Tax Unit of the Bureau of Internal Revenue and the regulations issued by the Administration remained in effect. TD-4974, June 12, 1940, effective June 30, 1940.

[26] F. A. A. Regs. 4, art. II; 5, art. II.

[27] *Id.* 4 and 5, art. III, §34; 7, art. II, §24.

[28] *Id.* 4, art. III, §§32-37; 5, art. III, §§32-39; 7, art. II, §§22-27.

[29] *Id.* 4, art. III, §32(a) (4).

and, in the case of distilled spirits, the presence of artificial or excessive coloring or flavoring material, the percentage of neutral spirits and the source thereof, the age of the whisky, and the state of distillation (except in certain instances) must appear.[30] The manner in which such statements shall be made and the place where they shall appear (whether on the main label or on a separate label) is set forth in detail, even in some cases to the extent of prescribing the exact form of the statement.[31] The regulations contain elaborate provisions for the protection of geographical designations and establish certain names which have become generic, others which may be used if the actual place of production is stated, and still others which may only be used if the product was in fact produced in the place indicated by the geographical name.[32] In the case of imported distilled spirits certain representations may only appear if supported by certificates issued by authorized officials of the appropriate foreign government.[33]

So much for the information which is required to appear upon labels. The regulations also contain detailed provisions prohibiting certain material from appearing upon labels, including statements which are false or untrue or which by ambiguity, omission, or inference tend to create a misleading impression, disparaging statements, obscene or indecent statements, misleading statements with respect to guaranties, the use of names which would falsely indicate endorsement or sponsorship, any simulation of government stamps, or indication of government approval, statements relating to analyses, standards or tests which might mislead the consumer, or statements with respect to curative or therapeutic effects.[34] In addition to the above, the respective regulations contain other provisions prohibiting practices which are applicable to the particular products covered.[35] The regulations also establish procedure for the withdrawal of imported alcoholic beverages from customs custody and for the bottling and withdrawal of domestic alcoholic beverages.[36]

The advertising requirements are in general less detailed;[37] for instance, only the name of the responsible advertiser, the class and type, the alcoholic content (except in the case of certain wines and malt beverages), and, in the case of distilled spirits, the percentage and source of neutral spirits used, are required to appear.[38]

[30] *Id.* 5, art. III, §§32, 34(c), 35(g), 38, 39.

[31] *E.g.*, see *id.* 5, art. III, §39, which sets forth the exact form of age statement which must be used upon labels of various types of whisky.

[32] *Id.* 4, art. II, §§24, 25; art. III, §§33(b), 34(b); 5, art. II, §21, classes 8 and 9; art. III, §33(b); 7, art. II, §§23(b), 24(e), (f), (g).

[33] *Id.* 5, art. III, §41(b) (2); art. IV, §46; art. V, §51.

[34] *Id.* 4, art. III, §39; 5, art. III, §41; 7, art. II, §29.

[35] *E.g.*, the wine regulations prohibit age statements other than vintage and bottling dates under certain circumstances. F. A. A. Regs. 4, art. III, §39(b), (c), (d), (e). The distilled spirits regulations limit the use of the words "bottled in bond," *etc.*, the word "pure," and the words "double distilled." *Id.* 5, art. III, §41(b) (3) and (4), (c), (d). The malt beverage regulations prohibit the use of numerals likely to be considered as alcoholic content statements, and words such as "strong," "full strength," and the words "bonded," "bottled in bond," *etc.* *Id.* 7, art. II, §29(c), (f), (g).

[36] *Id.* 4, arts. IV, V; 5, arts. IV, V; 7, arts. III, IV.

[37] *Id.* 4, art. VI; 5, art. VI; 7, art. V.

[38] *Id.* 4, art. VI, §62; 5, art. VI, §62; 7, art. V, §52.

The provisions with respect to prohibited statements are similar to those applicable to labeling,[39] with the added requirement that no statements may appear in advertisements which are inconsistent with statements appearing upon the label of the product,[40] and the further requirement, in certain cases, that if a statement is made in the advertisement, it shall appear in the form in which it is required to appear upon the label.[41] Although the distilled spirits regulations establish standards of fill for containers for such products,[42] standards of fill have not as yet been prescribed for wines and malt beverages.

With respect to advertising, the statute prohibits producers, importers, and wholesalers of alcoholic beverages from publishing any advertisement of alcoholic beverages by radio broadcast, in newspapers, periodicals, etc., or by signs or outdoor advertisements, or other printed or graphic matter which are not in conformity with the regulations.[43] The act covers not only such advertisements as are themselves in interstate or foreign commerce, but also includes all advertisements disseminated by mail and all advertisements which are calculated to induce sales in interstate or foreign commerce. Thus, it includes within the scope of the provisions outdoor signs or other advertising media fixed to a particular location whenever such media are used to invite the shipment of alcoholic beverages in interstate commerce. The legislative standards for the regulations are substantially the same as those prescribed for the labeling regulations, with the exception that they do not apply to outdoor advertising in place on June 18, 1935, when the industry was notified of the contemplated restriction on advertising material by the introduction of the bill in Congress.[44]

The statute establishes no procedure, similar to the label certificate system, requiring the submission of advertising material for approval in advance of publication. It has, however, been the past practice, as a policy matter, to review and comment informally upon proposed advertising material upon request. This has operated to correct in advance of publication a tremendous number of advertising campaigns, as well as individual advertisements, which would, if published, have resulted in a violation of the regulations.[45] These comments are, of course, as above stated, informal and are not considered to be binding upon the industry or the Government. In the event that the industry member does not agree with the position taken by the Government with respect to proposed material, he may, of course, publish the proposed material, without prejudice, and the correctness of the Government's position can then be tested in the manner provided by the statute.[46]

[39] *Id.* 4, art. VI, §64; 5, art. VI, §64; 7, art. V, §54.

[40] *Id.* 4, art. VI, §64(b); 5, art. VI, §64(b); 7, art. V, §54(b).

[41] *E.g.*, the distilled spirits regulations prevent any reference to age in advertisements unless a statement of age appears upon the label of the product and unless the representation in the advertisement includes all parts of the labeling age statement (Regs. 5, art. VI, §64(c)).

[42] *Id.* 5, art. VII.

[43] §5(f).

[44] 79 CONG. REC. 12267 (1935).

[45] During the calendar year 1939 approximately 2,835 proposed advertisements were reviewed by the Federal Alcohol Administration prior to publication and approximately 1,109 conferences held at the request of industry members, advertising agencies, *etc.* F. A. A. ADMR. ANN. REP. (1939).

[46] *I.e.*, by the institution of permit suspension proceedings, or of criminal prosecution, or of suit to restrain the violation. §§4(e), 7.

Advertising material appearing in newspapers, periodicals, and other publications is closely checked; in addition, radio scripts, recipe booklets, and other advertising material are reviewed whenever there is any question as to their validity.[47] The same penalties result from a violation of the advertising regulations as are provided in the case of labeling violations.

The industry and others interested were kept advised of the Administration's views on new practices in the trade and of its current interpretations of the statute and regulations by the issuance of circular letters covering separate interpretations or rulings in individual cases involving questions of general interest, and in the case of distilled spirits, digests or summaries of such interpretations.[48] In addition, the former Administrator attempted, through the cooperation of the industry, to discourage certain practices in advertising alcoholic beverages which were believed socially objectionable, for example, the use of Sunday newspapers as advertising media, the use of pictures of women, children, or religious objects or insignia, and references to tonic or food qualities.[49]

So much for the control of alcoholic beverage labeling and advertising under the Federal Alcohol Administration Act. As indicated above, the jurisdiction of the Federal Trade Commission and of the Food and Drug Administration extend into this field under their more general powers. These agencies have, however, since the passage of the Federal Alcohol Administration Act, limited their exercise of this jurisdiction to cases which were not covered by the Federal Alcohol Administration Act, referring cases in which there is concurrent jurisdiction for treatment under the more specific statute.[50]

Turning to the Federal Trade Commission Act, Section 5 declares unfair methods of competition in commerce to be unlawful and authorizes the Commission to prevent anyone from using such methods.[51] The Commission is authorized to proceed against violators by complaint and cease and desist order. It was formerly necessary for the Commission not only to prove that a particular practice was unfair and that a proceeding was to the interest of the public, but also that the practice was engaged

[47] F. A. A. ADMR. ANN. REP. (1939) contains the statement that all alcoholic beverage advertisements appearing in 26 newspapers and 40 magazines were regularly reviewed, in addition to the review of all such advertisements appearing in 60 different daily newspapers in varying localities. It also states that 67,162 newspaper and magazine advertisements and 6,970 advertisements in the form of booklets, leaflets, posters, *etc.*, have been examined during the past year. This statement did not include the monthly review of approximately 425 commercial radio broadcasts.

[48] These circulars bore the symbol FA and were, as indicated, of an explanatory or an informative nature. The summaries referred to were FA-91, Jan. 21, 1937 and FA-123, Oct. 15, 1937.

[49] The former Administrator of the F. A. A. urged the elimination of these practices in several speeches before meetings of members of the industry or of the various state liquor agencies. It was also recommended in the annual reports that Congress prohibit these practices by legislation.

[50] This "informal collaboration" between the F. A. A. and the F. T. C. is referred to in the monograph, ATTY. GEN'S. COM. ON ADM. PROC., THE FEDERAL TRADE COMMISSION (1940) note 22.

[51] "Section 5. (a) Unfair methods of competition in commerce, and *unfair or deceptive acts or practices in commerce,* are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons . . . from using unfair methods of competition in commerce and *unfair or deceptive acts or practices in commerce.*" 38 STAT. 719 (1914) as amended by 52 STAT. 111 and 1028 (1938), 15 U. S. C. §45 (Supp. IV 1938).

in in competition and resulted in an injury to competitors. Thus, the protection of consumers was necessarily incidental to the protection of competitors. The 1938 amendments to the act added to the phrase "unfair methods of competition," "unfair or deceptive acts or practices." This latter phrase does not add anything to the type of case over which the Commission formerly had jurisdiction, but makes it unnecessary for the Commission to show in each case any injury to respondent's competitors.[52]

In 1929 the Commission determined to give special treatment to misrepresentations occurring as the result of false and misleading advertising, and since that time it has reviewed newspaper and magazine advertising and, since 1934, radio advertising.[53] The Commission can, however, deal only with individual cases as they arise in commerce and is neither entitled to formulate general rules for the control of advertising nor to require that mandatory information be contained in advertising material. The 1938 amendments to the act do not change this situation.[54]

The cases which the Federal Trade Commission has undertaken in the liquor field involve roughly four general types of representations: (1) representing a product to be something which it is not;[55] (2) false representations that the product has a certain geographical origin;[56] (3) representations that a product has been made by a

[52] The purposes of these amendments are summarized in the report of the Committee on Interstate and Foreign Commerce of the House of Representatives: "To summarize, this legislation is needed to give the Federal Trade Commission jurisdiction over unfair acts and practices for consumer protection; to relieve the Government of unnecessary time and expense in proving an injury to a competitor as a prerequisite to consumer protection and to the suppression of an unfair method in commerce, and to give more effective and necessary control over false advertisements of food, drugs, devices, and cosmetics.

"The legislation seeks to establish no new bureaus or to take on new fields of activity, but rather to provide more effective methods of accomplishing that, which broadly speaking, are the purposes of the existing law." H. R. REP. No. 1613, 75th Cong., 1st Sess. (1937) 9. The following excerpts from the report indicate Congressional intention to change the base of the statute from competition to consumer protection: "The words 'unfair method of competition' in section 5 have been construed by the Supreme Court as leaving the Commission without jurisdiction to issue cease and desist orders where the Commission has failed to establish the existence of competition. In other words, the act is construed as if its purpose were to protect competitors only and to afford no protection to the consumer without showing injury to a competitor. . . . By the proposed amendment to section 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." *Id.* 3.

[53] F. T. C. ANN. REP. (1938).

[54] "It will be observed that it is not mandatory on the advertiser to state anything. The only requirement is in case he does advertise, he shall not make statements that are misleading in a material respect. It is incumbent on the advertiser to reveal facts material in the light of representations made in the advertisement." H. R. REP. No. 1613, 75th Cong., 1st Sess. (1937) 5.

[55] *E.g.*, F. T. C. Stipulations Nos. 1315, 1316, 1396, 1398, 1412, and 1472 corrected a misuse of the designation "Champagne"; No. 1398 prevented the use of the term "Sparkling Burgundy" on a certain product unless accompanied by the word "carbonated"; Nos. 1387 and 1547 corrected representations that whiskies were "Scotch," "bottled in bond," or "made from finest American grain"; see also Stipulation No. 232 and cease and desist orders on Complaints Nos. 2803 and 2949.

[56] *E.g.*, Stipulations Nos. 949, 956, 1055, 1310, and 1325 corrected the misuse of the geographical names "St. Thomas" and "West Indies" in connection with rum not produced in those localities; No. 2510 discontinued the use of the words "Cervesa-exquisita Chapultepec" on beer not made in Mexico and imported into this country. See also Stipulation No. 2108, and a cease and desist order on Complaint No. 2849, which ordered a company to discontinue representing that its whisky was distilled in Scotland or

certain process or under certain sponsorship;[57] (4) false representations as to the trade status of the producer or vendor.[58]

The 1938 amendments to the Federal Trade Commission Act contained specific provisions with respect to the dissemination of false advertisements of foods (the definition of food is broad enough to include alcoholic beverages), drugs, devices, or cosmetics, by mail or in interstate commerce, and made such dissemination an unfair or deceptive practice under Section 5.[59] It also gave the Commission power, under certain circumstances, to bring suit to enjoin the dissemination of such an advertisement,[60] and made it no longer necessary for the Commission to prove that the advertisement was disseminated with a fraudulent intent.[61]

It should, however, be noted that the only remedies offered by the act consist in the issuance of a cease and desist order or injunction proceedings which usually would occur after the advertisement has been presented to the public, and that there is no effective punishment for the dissemination of a false liquor advertisement other than the mere discontinuance of its use. Moreover, the act does not provide for any correlation between the advertising of a product and the labeling thereof, nor require that information concerning products advertised be furnished to the public. All of

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that the bottler distilled it or operated a distillery when the whisky was in fact distilled and bottled by another company outside of Scotland.

[57] *E.g.*, F. T. C. Stipulation No. 1288 discontinued the designation of a beer as "Krausened" when it was not carbonized with its own natural gas; No. 1948 discontinued representations that lager beer is dependent on lengthy aging, that the company's storage capacity was the largest in the West, and that it has brewed ale and stout since 1878, when untrue. Complaint No. 2888 was dismissed when four brewing companies agreed by stipulation to discontinue representing that their products contained no carbohydrates or fat-producing properties, that a special non-fattening formula produced a slenderizing effect on people of excess weight; the beer could, however, be represented as "dietetically non-fattening." See also cease and desist order on Complaint No. 2819. Stipulation No. 2037 corrected the false statement that a certain rum produced in the Virgin Islands was distilled, aged, or bottled under U. S. Government supervision; see also Stipulation No. 2460.

[58] This type of case is by far the most common. In approximately 100 instances the Commission has by cease and desist orders or stipulations forced the discontinuance of false representations that a company operated a distillery, or distilled its products. Usually these representations included the use of the words "distiller," "distillery," "distillers," "distilling company," *etc.*, in or in connection with the corporate name. The fact that in preventing this comparatively simple practice it has been necessary to institute over 100 separate proceedings in the past and will be necessary to institute new proceedings in the future whenever it is indulged in, indicates the greater efficiency and economy resulting from prohibiting such practices by the issuance of regulations.

[59] 52 STAT. 114 (1938), 15 U. S. C. §52 (Supp. IV, 1938). "Section 12 (a). It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—(1) by United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or (2) by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

"(b). The dissemination or causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5."

[60] 15 U. S. C. §53 (Supp. IV, 1938).

[61] The House Committee report states: "A false advertisement is defined as one 'which is misleading in a material respect.' Certain specified matters are to be considered in determining whether or not an advertisement is misleading. This definition is very broad. It will be noted that a fraudulent intent is not a necessary element of a false advertisement. The essential elements of a false advertisement are that it is misleading, and misleading in a material respect. . . ." H. R. REP. No. 1613, 75th Cong., 1st Sess. (1937) 5.

these elements are particularly important in connection with alcoholic beverage advertising.

The Federal Food and Drug Act of 1906 prohibited anyone from shipping or receiving in interstate commerce any adulterated or misbranded food or drugs on penalty of a fine or imprisonment or both. The definition of the term "food" contained in the statute was sufficiently broad to cover all alcoholic beverages.[62] In addition to the criminal penalties, the Act provided for the seizure and confiscation of misbranded or adulterated articles and prohibited the importation of articles which were prohibited or restricted in the country from which exported.

Section 3 of the statute authorized the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce to make uniform rules and regulations. Although no comprehensive liquor regulations were issued under the statute, standards for wine, dry wine, fortified dry wine, sweet wine, and fortified sweet wine were adopted,[63] and a few decisions with respect to the labeling of alcoholic beverages were issued under the act or general regulations.[64] These various decisions constituted an important foundation for the building of the Federal Alcohol Control Administration's regulations. They were extremely important in establishing customary trade practices and as indicative of types of earlier misbranding practices and of possible corrective measures.

After a long and perilous gestation in Congress, the new Food, Drug and Cos-

[62] 34 STAT. 768 (1906); 21 U. S. C. c. 1. The definition of "drug" is also broad enough to cover such alcoholic beverages as are also defined in the U. S. PHARMACOPOEIA and NATIONAL FORMULARY. In view of the fact that this article is concerned with alcoholic beverages as such, controls over the labeling and advertising of alcoholic beverages for medicinal use are not within its scope. §8 of the statute provided roughly that an article was misbranded (1) if labeled with any statement, design, or device which is false or misleading in any particular, or (2) if misbranded as to the state or country of production, or (3) if an imitation of or sold under the name of another article, or (4) if labeled so as to deceive or mislead the purchaser, or (5) if it purports to be a foreign product when not so, or (6) if substitution shall have been made for its original contents, or (7) if not labeled with the quantity of any of certain named drugs, or (8) if not labeled with the contents in terms of weight, measure, or numerical count (with certain exemptions), or (9) if labeled with any false or misleading statement, design, or device, regarding its ingredients or contents.

[63] U. S. Dept. Agriculture, Definitions and Standards for Food Products, Service and Regulatory Announcements, Food and Drug No. 2, 4th Revision, Aug., 1933.

[64] The most important of these was Food Inspection Decision 113, Feb. 16, 1910, which was issued to carry into effect President Taft's decision in the whisky controversy, *supra* note 3, and specified instances in which whisky would have to be labeled "blended," "compound," or "imitation." See also F. I. D. 125, July 30, 1910; F. I. D. 141, Feb. 17, 1912; F. I. D. 156, June 12, 1914; F. I. D. 152, Sept. 3, 1913; F. I. D. 122, June 20, 1910; F. I. D. 127, Oct. 19, 1910; F. I. D. 85, Feb. 3, 1908.

Certain of the Service and Regulatory Announcements of the Bur. of Chemistry of the Dept. of Agriculture related to the labeling of alcoholic beverages, notably S. R. A. Chem. 3, item 25, May 12, 1914, as amended, by S. R. A. Chem. 7, item 67, Aug. 25, 1914; S. R. A. Chem. 16, item 158, Jan. 26, 1916; S. R. A. Chem. 21, item 242, Nov. 12, 1917; S. R. A. Chem. 3, item 30, May 12, 1914; S. R. A. Chem. 22, item 267, April 8, 1918; S. R. A. Chem. 17, item 175, May 12, 1916; S. R. A. Chem. 16, item 160, Jan. 26, 1916 (holding that Scotch whisky must be manufactured in Scotland); S. R. A. Chem. 3, item 26, May 12, 1914 (providing that California brandy having the characteristics of Cognac and similarly produced may be labeled "Brandy—Cognac type" if the state of production is also stated); S. R. A. Chem. 20, item 224, July 2, 1917; S. R. A. Chem. 17, item 174, May 12, 1916; and S. R. A. Chem. 20, item 223, July 2, 1917; S. R. A. Chem. 19, item 204, March 12, 1917, and S. R. A. Chem 20, item 227, July 2, 1917, requiring that spirits imported from Great Britain be accompanied by a certificate from the British Government to the effect that they are suitable for home consumption in view of the requirements of the BRITISH IMMATURE SPIRITS ACT that spirits for home consumption be warehoused for at least three years.

metic Act came into being on June 25, 1938.[65] Among other things this act greatly increased the Government's powers over the labeling of food, not alone prohibiting the adulteration and misbranding of foods in interstate commerce and the shipment or receipt of such foods (§301(a), (b), and (c)), but also the alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any act to, an article of food held for sale after shipment in interstate commerce which results in the article being misbranded (§301(k)). Provision is made for injunction proceedings to restrain violations and for additional and more stringent penalties (§§302 and 303).

Perhaps the greatest advance in the control of labeling may be found in Section 401, which authorizes the promulgation of regulations fixing "reasonable" definitions and standards of identity, standards of quality, and standards of fill which will "promote honesty and fair dealing in the interest of consumers." As in the case of the 1938 amendments to the Federal Trade Commission Act, the protection of the consumer has become paramount. Provision is also made for the serving of notices and the holding of public hearings in connection with such regulations (§701(e)).

The term "misbranding" is for the first time given the specific interpretation of including a consideration, not only of representations appearing upon the label, but also of whether material facts are omitted with respect to the consequences which may result from the use of the article under the conditions prescribed on the label or under customary or usual conditions. Moreover, the definition of misbranding foods has been broadened and made much more definite. Roughly paraphrased, Section 403 of the act provides that a food is deemed misbranded (a) if its labeling is false or misleading in any particular, (b) if offered for sale under the name of another food, (c) if an imitation of another food unless the name of such food appears followed by the word "imitation," (d) if its container is so made, formed, or filled as to be misleading, (e) if packaged, unless labeled with the name and address of the manufacturer, packer, or distributor, and the net contents (subject to exemptions), (f) if any statement required by the Act or regulations to appear does not appear conspicuously, (g) if purported to be a food for which a standard has been prescribed unless it conforms to the standard and bears the name of such food and the names of optional ingredients if required, (h) if it purports to be a food for which a standard of quality or of fill has been prescribed and it falls below such standard unless it bears a statement to this effect, (i) if not subject to (g), unless it is labeled with the common or usual name of the food and, if made of two or more ingredients, the common or usual name of each such ingredient (with certain exceptions), (j) if it purports to have a special dietary use unless labeled with such information concerning its dietary properties as may be prescribed by regulations in "order fully to inform purchasers as to its value for such uses," (k) if it contains any artificial flavoring or coloring or any chemical preservatives unless labeled with this fact (subject to exemptions). No standards for alcoholic beverages have been

[65] 52 STAT. 1040 (1938), 21 U. S. C., c. 9 (Supp. IV, 1938). See *The New Food, Drug and Cosmetic Legislation* (1939) 6 LAW & CONT. PROB. No. 1 (entire issue).

prescribed under the act, although it is broad enough to authorize the promulgation of such standards.[66] Moreover, as a matter of practice all matters relating to the labeling of alcoholic beverages are, if covered by the Federal Alcohol Administration Act, referred for treatment under the more specific statute.

The federal power to control advertising and labeling of alcoholic beverages in the interstate field is complemented by the powers of the several states to control these practices within their own borders and, under the Twenty-first Amendment, to prohibit the entry of beverages which fail to comply with their several requirements. In the large majority of the states the liquor control agency is specifically empowered to prescribe labeling regulations;[67] the broad power to prescribe advertising regulations has, however, not been so generally bestowed.[68] In a few of the states, the liquor statutes themseves contain labeling or advertising requirements[69] or even standards for certain beverages commonly produced therein[70] or prohibit the use of certain advertising media for alcoholic beverages.[71]

[66] Alcoholic beverages have, of course, also been subject as "foods" to the various state food and drug acts which are, in the main, similar to the federal act of 1906.

[67] Ala., Calif. (Bureau of Food and Drug Inspection), Conn., Del., Fla., Ga., Idaho, Ill., Ind., Iowa, Ky., Md., Mass., Mich., Minn., Mo., Mont., Neb., N. H., N. J., N. Y., N. C., N. D. (Food Commissioner), Ohio, Ore., Pa., S. C., S. D., Tenn., Tex., Vt., Va., Wash., W. Va. and Wis. This does not include states which have the general power to issue regulations to administer the provisions of the several liquor control acts.

[68] Conn., Ga., Ind., Iowa, Ky., Md., Minn., Mont., Neb., N. H., N. C., Ohio, Ore., S. D., Tenn., Tex., Vt. and W. Va. Many other state agencies have issued advertising regulations under general statutory powers to promulgate regulations to administer the liquor statutes and control the traffic in alcoholic beverages.

[69] *E.g.*, art. VI, §6, of the ILL. LIQUOR CONTROL ACT, as amended (43 ILL. STAT. (Smith-Hurd, Supp. 1939-40) 124), provides that labels on alcoholic beverages must bear the name and address of the manufacturer, the kind of liquor, the date of manufacture (except beer and 4-year-old Scotch whiskey and brandy), and the minimum alcoholic content. Similar provisions are found in the Maine, Mont., Neb., Okla. (beer), Pa., Tex. (beer), Utah (beer) and Wash. laws. State statutes also frequently prohibit representations that beer is "strong," "high-test," "pre-war strength" and similar representations of alcoholic content (Ky., Miss., Okla., and Pa.); other state statutes prohibit the use of the word "bar" or "saloon" on signs (Calif., Iowa, Mont., Wis.). There is, however, little uniformity of statutory provisions with respect to labeling and advertising. They run all the way from an isolated provision in the Michigan statutes (MICH. COMP. LAWS (Mason's 1935 Supp.), §17115-42) which makes it a misdemeanor to post or distribute any advertisement for intoxicating liquor containing any reference to any deceased ex-President of the U. S. A. to a law in Vermont (Pub. Laws 1933, §8647), prohibiting liquor advertising within 200 feet of a church. In some states the size and contents of outside signs has been made a subject of statutory control (Idaho, Calif., Me.). In general, however, it may be said that where the state law provides for an exercise of any broad control in the advertising and labeling field, it does so by authorizing an agency to promulgate regulations filling in the details of control.

[70] *E.g.*, the ILL. LIQUOR CONTROL ACT, *supra* note 69, provides that no product may be labeled "gin" or "whiskey" unless its entire alcoholic content is derived from grain; otherwise it must be labeled "imitation." Kentucky has gone ever farther and has established a standard and immature spirits control for whiskies bearing the name "Kentucky." CARROLL'S KY. STATS. (Baldwin's 1936 revision, 1939 Supp.) §2554b-169.

[71] For instance the Alabama statute provides that liquor advertising may only be carried in newspapers, magazines, or on the radio except in the case of wine and beer, which may also appear on billboards. The Arkansas statute provides that in no event shall liquor advertising be prohibited in newspapers; in Delaware poster boards and painted bulletins are permitted for wine and beer in Wilmington, and newspaper, periodical and radio advertising is expressly permitted. In Kentucky it is unlawful to distribute handbills or posters in dry territory and the power to regulate advertisements in newspapers, magazines, or periodicals is expressly reserved by the statute. In Mississippi all advertising of alcoholic beverages is prohibited except in the case of beer and light wines; in Montana illuminated signs are prohibited; in New Hampshire all advertising of liquor except in newspapers, magazines, periodicals and over the radio is prohibited unless authorized by the Commission; in North Carolina advertising

The chaotic situation which would result if varying regulations with respect to labeling and advertising were issued by each state agency as well as by the Federal Government early became apparent[72] and, in order to avoid economic waste, to facilitate administration, and to provide consumers with the same protection when buying intrastate products that they receive in the case of interstate products, the Federal Alcohol Administration consistently urged that its labeling and advertising regulations be adopted by the various states as minimum requirements.[73] This effort has received the hearty support of the industry, since it eliminates much of the difficulty and expense involved in advertising and distributing their products throughout the country. It has, moreover, been promoted by the Council of State Governments[74] and by the two associations composed respectively of state liquor administrators for the monopoly and for the license states[75] and proposed uniform bills have been drafted[76] for submission to the state legislatures.

The fact that, in several state laws, the power delegated to the state agency to issue its own regulations contains a specific reference to the federal regulations and in a few instances actually incorporates them by reference indicates that the desirability for uniformity in labeling and advertising control is recognized by the state legislators themselves.[77]

The views of state officials have been requested at all of the public hearings held for the consideration of federal regulations, and several conferences have been held

alcoholic liquors on billboards along public highways or streets is prohibited by statute; in Utah the statute prohibits electric or illuminated signs, signboards, billboards, display signs and advertising pieces except in the case of light wines; in Idaho and Iowa advertising of alcoholic liquors is prohibited except as permitted by federal statute and regulations. Limitation of space prohibits any discussion in this article of the many provisions with respect to advertising requirements of the regulations of the various state liquor control agencies.

[72] The report of the 1935 Committee on Uniform Laws of the National Conference of State Liquor Administrators recommended the adoption of uniform labeling regulations based upon those of the F. A. A. This report was approved as the sense of the conference at its annual meeting in December of 1936.

[73] The former Administrator repeatedly recommended the adoption of uniform state labeling and advertising regulations in various addresses before meetings of industry trade associations and of state liquor control officials during 1936-1939.

[74] Uniform labeling and advertising based upon the F. A. A.'s regulations was endorsed at the Regional Liquor Control Conference, sponsored by the Council of State Governments in New York, Dec. 19, 1936, and Nov. 18, 1938, and in Buffalo, N. Y., Jan. 5, 1940.

[75] Resolutions with respect to the adoption of federal labeling regulations were adopted at the Conference of Liquor and Beer Administrators in Des Moines, Iowa, in Dec. 1936 and at the National Conference of State Liquor Administrators, St. Paul, Minn., June 15, 1938 (uniform advertising regulations).

[76] These bills were drafted to authorize the adoption by the state liquor control agency of regulations restricting advertising which "shall, as far as possible, be in the interest of a minimum uniform national standard," and in the case of labels which should "be calculated to prohibit the deception of the consumer; to afford him adequate information as to quality and identity; and to achieve national uniformity in this field in so far as possible" (Legislative Proposals Nos. 1 and 5, presented at the 4th General Assembly of the Council of State Governments, held in Washington, D. C., Jan. 18, 1939, and presented at various regional conferences on liquor control sponsored by the Committee on Interstate Cooperation of the Council of State Governments).

[77] In Ga., Ky., N. C. and S. C. certain of the federal regulations have been incorporated by reference into the state liquor law itself. This procedure was followed in N. M. but the provision was repealed after its constitutionality had been questioned. In other states it is provided that the regulations shall be "not inconsistent with" (Ga., Neb. and S. D.), "similar to" (Md.), "which shall comply with" (Fla.), "not in conflict with" (Ohio), "in strict accordance with" (Tex.), or "to adopt" (Ky., Vt. and Tenn.) the F. A. A.'s regulations specifically or federal requirements generally.

for the discussion of labeling and advertising problems. The most important of these took place on October 25, 1938, as a result of resolutions passed at the annual meetings of the two state liquor control groups, and resulted in the forwarding to each state agency of a questionnaire to ascertain its reaction to the myriad questions involved in the control of liquor advertising.[78]

To date, 32 states have adopted the Administration's regulations in whole or in part.[79] In the case of such states, as noted above, the Federal Alcohol Administration discontinued the issuance of certificates of exemption from label approval, and, when requested, forwarded copies of all letters with respect to advertising in such state to the state agency. By this means a high degree of uniformity of control has been attained, even though the state may impose additional and more detailed requirements of its own.[80] In this field, too, however, the situation with respect to malt beverages is more complicated than that of distilled spirits and wine, in view of the fact that in several states the regulation of such beverages is not included in the liquor control act but in separate legislation frequently of a revenue rather than a social nature.[81] The adoption of the federal regulations has been accomplished either by a regulation incorporating the federal requirements by reference or by reissuing as state regulations the separate requirements of the federal regulations.[82]

In addition to the existing federal and state controls over alcoholic beverage labeling and advertising, some reference should be made to legislation now pending before Congress which, if passed, will affect this subject. In his annual reports to Congress for the years 1937, 1938, and 1939, the Administrator of the Federal Alcohol Administration recommended that Congress amend that act to prohibit the advertising of alcoholic beverages over the radio.[83] Although the action of the Distilled Spirits Institute in declaring itself opposed to the use of this advertising medium for distilled spirits and of the National Association of Broadcasters in adopting a resolu-

[78] The replies to this questionnaire indicated that, out of 17 state agencies, 14 desired uniformity of state advertising regulations, 1 was opposed, and 2 believed it would be impracticable; 13 state agencies expressed themselves in favor of further affirmative action to attain uniformity. The replies to the questionnaire upon the detailed questions with respect to the use of various advertising media and the prohibition or regulation of many forms of representations in liquor advertising indicated, however, that wide divergence of opinion which is reflected in the present state regulations.

[79] Ten states have adopted the labeling and advertising requirements for wine, distilled spirits and malt beverages (Ariz., Mo., Me., Mont., S. C., Texas, Tenn, Utah, Va., and W. Va.); 4 more states have adopted the labeling and advertising requirements for wine and distilled spirits (Idaho, Minn., N. C., and Pa.); Ga. and Ohio have adopted both labeling and advertising requirements for wine and Ga. has also adopted the labeling requirements for distilled spirits; 10 states have adopted the labeling regulations for all alcoholic beverages but have not adopted the advertising requirements (Del., Ill., Ky., Neb., N. J., N. Y., Ore., R. I., S. D., and Wis.); N. H. and Iowa have adopted the distilled spirits and wine labeling requirements, and Calif., Mich. and Wash. have adopted the distilled spirits labeling requirements alone. State adoption is, of course, usually limited to such provisions as are not in conflict with the provisions of the state law and, in some cases, it is further limited by the jurisdictional limitations of the agency itself. In a few instances the adoption of the advertising regulations is limited to the prohibition of representations from advertising and does not include the mandatory information requirements.

[80] *E.g.*, Idaho, Me. and Va. have issued extensive and detailed advertising regulations of which the adoption of the federal regulations forms a foundation, covering advertising material, for the state's more specific requirements.

[81] This situation occurs, for example, in Idaho, Ind., Pa., Tenn., Tex. and W. Va.

[82] In Ohio, Calif., Minn., the latter method is followed. [83] F. A. A. ADMR., ANN. REPS. (1937-1939).

tion not to carry distilled spirits advertising[84] has limited the use of this medium by distillers, it has been used to an increasing degree by retailers of distilled spirits and by producers, wholesalers, and retailers of wines and malt beverages. The former Administrator expressed the opinion that this form of advertising was especially dangerous since it enters directly into the home and the family circle and brings the advertised product forcibly to the attention of those who are conscientiously opposed to it, and of those who are not proper prospective consumers.[85] The results of the questionnaire on advertising submitted to the liquor control agencies of the various states (referred to above) indicated that an overwhelming majority of these agencies shared his views.[86]

In 1939 a bill to amend the Federal Alcohol Administration Act was introduced before Congress, which, among other things, added radio advertising to the practices prohibited by Section 5 of the act, but no action was taken thereon.[87] Several other bills prohibiting varying types of liquor advertising in interstate commerce have been introduced.[88] The only measure of this kind which has been reported out of committee favorably is S. 517 which was introduced at the first session of the 76th Congress by Senator Johnson, of Colorado.[89] This bill is the successor to S. 3550 which he introduced the year preceding at the last session of the 75th Congress, but which

[84] The resolution referred to read: "*Resolved,* that it is the sense of the National Association of Broadcasters Board of Directors that American broadcasting stations should not carry advertising for distilled spirits, commonly called hard liquor."

[85] The former Administrator expressed this view in addresses delivered on several occasions: (1) Before the National Retail Liquor Package Stores convention in Chicago, Ill., on Feb. 22, 1937, (2) before the National Conference of State Liquor Administrators on Mackinac Island, Mich., July 19, 1937, (3) before the National Conference of State Liquor Administrators at St. Paul, Minn., June 13, 1938, (4) before the National Alcoholic Beverages Control Association at Columbus, Ohio, April 19, 1939, (5) before the National Retail Liquor Package Stores convention at Boston, Mass., June 13, 1939, and (6) before the National Alcoholic Beverages Control Association at Bretton Woods, N. H., Sept. 6, 1939.

[86] Fifteen agencies expressed themselves as opposed to the use of this medium for liquor advertising and only one was opposed to its prohibition.

[87] H. R. 6219. The proposed amendment read: "(g) Radio Advertising.—It shall be unlawful for any person required to secure a basic permit under the provisions of this Act, or for any other person, or for any person for, or in behalf of such persons, to broadcast or cause to be broadcast, directly or indirectly, by means of radio, any advertisement of an alcoholic beverage, nor shall any such persons or any person for, or in their behalf, pay for or sponsor, directly or indirectly, any radio program, or be mentioned in any radio advertisement if, either by use of a trade name or otherwise, reference is made to the fact that such person is engaged in the manufacture, sale, or other distribution of any alcoholic beverage." This bill was introduced in the House of Representatives by Mr. Doughton of North Carolina (by request) and was referred to the Committee on Ways and Means.

[88] *E.g.,* A Bill to Amend the Communications Act to Prohibit the Advertising of Alcoholic Beverages by Radio. H. R. 9624, 75th Cong., 3d Sess. (1938); A Bill to Prohibit the Transportation in Interstate Commerce of Advertisements of Intoxicating Liquors, *etc.,* H. R. 253, S. 575, 76th Cong., 1st Sess. (1939). The first of these bills made it unlawful to broadcast or to permit the broadcasting of any advertisement or information concerning any alcoholic beverage with the intent of inducing the purchase thereof, subject to a maximum fine of $1000 or imprisonment for not more than a year, or both; the latter prohibited any producer, wholesaler or retailer, publisher, common carrier, or private carrier for hire to mail or otherwise transport any "newspaper, periodical, newsreel, photographic film, or record for mechanical reproduction advertising intoxicating liquor" or soliciting orders for intoxicating liquor as defined by the laws of the state or territory into which the advertisement or solicitation is transported and also prohibited the broadcasting by means of a licensed radio station of any such advertisement, subject to a maximum fine of $1000 or imprisonment for not more than 6 months, or both.

[89] Similar bills (H. R. 251, 252) were introduced in the House of Representatives by Mr. Culkin at the same session and were referred to the House Committee on Interstate and Foreign Commerce.

was not reported on by the Senate Committee on Interstate Commerce. In its original form, S. 517 was identical with H. R. 9624 at the same session; however, as reported out by the Committee, it was revised by adding one additional section conditioning all permits issued under the Federal Alcohol Administration Act upon compliance with its provisions and directing the Administrator to revoke or suspend permits for a willful violation thereof.[90]

It was the opinion of the majority[91] of the Committee that the bill would apply "merely to commercial advertising of liquor over the radio and would not affect any right of free speech or public discussion of the liquor question by any citizen or group of citizens." The minority report of Senator Gurney objected mainly to singling out for elimination liquor advertising over the radio, and stated that only 5% of all expenditures for liquor advertising occurred in this field. The minority report appears to be based upon the assumption that there is no necessity for the bill, that it discriminates against the radio industry, and that it would be harmful to the brewing industry. It urges that any abuses that may occur in radio advertising can be corrected by the self-regulation of the industry, or by the Government under the Federal Communications Act, the Federal Trade Commission Act, or the Federal Alcohol Administration Act.

In discussing S. 517 on the floor of the Senate,[92] Senator Johnson strongly criticised Senator Gurney's attack on the bill, objected to its being considered fanatical legislation, and to the attempt to have it taken up with S. 575. He pointed out that radio broadcasting is a public utility and that therefore advertisements over the radio are in an entirely different category from advertisements appearing in newspapers and magazines. Senator Johnson has attempted to have this measure considered by the Senate, but it has not yet been brought to a vote.[93]

Although there is no longer any question but that Congress has the power to regulate, under the commerce clause, the transmission of messages by means of radio broadcasting,[94] it may be argued in connection with this legislation that this power to regulate would not support a statute prohibiting outright the use of radio broadcasting for a particular type of advertising material unless such material was in itself immoral or harmful.[95] It should, however, be pointed out that the Supreme Court has already included liquor among the special category of dangerous articles which are subject to an unusually broad power of regulation by Congress.[96]

[90] S. 517, Calendar No. 362, 76th Cong., 1st Sess., as reported.

[91] The majority report upon the bill contains the following significant statement as to its origin: "Following the recommendations of the Federal Alcohol Administration, many times repeated, and the urgent request of hundreds of thousands of parents petitioning Congress for the protection of their homes against offensive vocal advertising, Senator Edwin C. Johnson introduced S. 517. Later the bill was amended upon the suggestion of the Treasury Department to simplify the enforcement features of the bill." SEN. REP. No. 338, 76th Cong., 1st Sess. (1939).

[92] 84 CONG. REC. 15169-15174, Aug. 3, 1939. [93] 86 CONG. REC. 2473, Feb. 19, 1940.

[94] Fishers Blend Station, Inc. v. State Tax Comm., 297 U. S. 650 (1936); Fed. Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266 (1933).

[95] Champion v. Ames, 188 U. S. 321 (1903); Hipolite Egg Co. v. United States, 220 U. S. 45 (1911); Webber v. Freed, 239 U. S. 325 (1915).

[96] See Clark Distilling Co. v. Western Md. R. R., 242 U. S. 311, 332 (1915).

TRADE PRACTICE AND PRICE CONTROL IN THE ALCOHOLIC BEVERAGE INDUSTRY

JOE DE GANAHL*

With Repeal came a new type of regulation in the alcoholic beverage industry. Pre-Prohibition legislation related principally to taxation and the regulation of the retail sale of alcoholic beverages in the social interest. There was no attempt to regulate the relationships between the retailer and his vendors.

The failure of this legislation was due in part to the failure to recognize the effects of industrial organization on the manufacture and sale of alcoholic beverages. With the rise of the large distilling and brewing corporations seeking new markets through high-pressure sales organizations, the independent tavernkeeper, theretofore subject to the restraints imposed by local legislation and local public opinion, ceased to exist.[1] Among the devices used by the powerful sales organizations to achieve control of the local saloons was the furnishing of equipment, extension of credit, payment of rebates, and the rendering of liberal financial assistance in other ways.[2]

The resulting tied-house was one of the factors which brought the saloon into disrepute and helped to bring about Prohibition.[3] This fact, emphasized in the studies of pre-Prohibition regulation, conducted in anticipation of Repeal, made it clear that post-Repeal legislation would have to embrace legislation controlling the relationships between manufacturers, importers, and wholesalers and retail establishments.

This type of legislation, however, had other roots quite distinct from the efforts to

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[1] Nat. Comm. on Law Obs. and Enf., *Report on the Enforcement of the Prohibition Laws of the United States* (Wickersham Report), H. Doc. No. 722, 71st Cong., 3d Sess. (1931) 6, 7.

[2] FOSDICK AND SCOTT, TOWARD LIQUOR CONTROL (1933) 43, 44.

[3] The Circuit Court of Multnomah County, Oregon, in upholding regulations requiring price posting, said in Alberts Products Co., Inc., v. Oregon Liquor Control Comm. (May 13, 1936): "The Act states in its preamble one of its purposes is to prevent the recurrence of abuses associated with saloons or resorts for consumption of alcoholic beverages.

"Now, it is a matter of general knowledge that in pre-prohibition days, one of the great abuses connected with the liquor traffic was the control exercised by brewers over saloons, and to prevent that control wholesalers and manufacturers are prohibited from rendering any financial assistance to the retail dealers in beer.

"Section 12, by requiring wholesalers to file schedules of prices and to adhere to them, it seems to me, is a reasonable measure to prevent the giving of financial assistance which would tend to bring a retailer within the control of the wholesaler."

avoid the evils of the pre-Prohibition tied-house. It happened that Repeal was coincident with the wave of desire for reform in competitive practices in industry generally, the movement being translated into New Deal legislation such as the National Industrial Recovery Act.[4] The concept of fair competition, stressed in the industrial codes generally, contemplated the elimination of the rendering of secret discounts, rebates, and other special concessions to favored trade buyers.[5] It is quite natural that those who were interested in avoiding the recurrence of the tied-house situation should look to the National Industrial Recovery Act as a vehicle for accomplishing the elimination of the devices formerly employed by brewers and distillers in gaining control of retail establishments. Those devices were in many respects identical with the practices which the codes under the National Industrial Recovery Act purported to eliminate in other industries.

Expediency also made it desirable to employ the codes as the vehicle for post-Repeal regulation in the liquor industry, for Repeal had come so quickly that Congress had no time to consider regulation by legislation. The existing machinery of the National Industrial Recovery Act furnished an opportunity to provide immediate regulation and so avoid a period of confusion. Repeal became effective on December 5, 1933. By December 27th the last code of fair competition for the alcoholic beverage industry had been approved, some of them having been promulgated in anticipation of Repeal. They were to serve as a pattern for subsequent state and federal legislation[6] designed to prevent the return of the tied-house and to promote fair competition by prohibiting various forms of inducement.

PROHIBITED PRACTICES

All of the codes in the alcoholic beverage field[7] contained prohibitions against agreements between vendors and retail buyers, under which the retailers were bound to sell only the products of a particular member of the industry. A similar provision was incorporated in Section 5(a) of the Federal Alcohol Administration Act.[8] The prohibition in the act is more stringent than the code provisions in that it prohibits

[4] 48 STAT. 195 (1933).

[5] The same policy underlies the ROBINSON-PATMAN ACT. 49 STAT. 1526 (1936), 15 U. S. C. §13.

[6] THE FEDERAL ALCOHOL ADMINISTRATION ACT, 49 STAT. 977 (1935) 27 U. S. C. §201 (1938), passed as a substitute for regulation of the industry by codes following the invalidation of the N. I. R. A.

[7] Codes of fair competition for the alcoholic beverage wholesale industry, the brewing industry, the distilled spirits industry, the distilled spirits rectifying industry, the alcoholic beverages importing industry, and the wine industry.

[8] The section provides: "It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

"(a) Exclusive outlet: To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce."

agreements which require a retailer to purchase products from the vendor to the exclusion, in whole or in part, of the products of competitors, subject, of course, to the jurisdictional requirements. Provisions aiming at the same practice appear in the laws of Alabama, Arizona, Arkansas, Georgia, Idaho, Illinois, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Texas, Utah, and Washington. In a number of these states the prohibitions relate to beer only. Such restrictive contracts are not only prohibited but are specifically declared void and unenforceable in a number of the state statutes.

Closely related to the prohibitions of Section 5(a) are those of Section 5(b)(7) which prohibit the inducement of the retailer "by requiring the retailer to take and dispose of a certain quota of any of such products." Somewhat similar provisions are contained in the laws or regulations of Alabama, Arizona, Kentucky, Minnesota, New Mexico, Texas, and Utah.

The codes, except that of the importing industry, contained prohibitions against the holding of an interest in retail establishments selling alcoholic beverages for consumption on the premises. The practice is prohibited by Section 5(b)(1) and Section 5(b)(2) of the Federal Alcohol Administration Act.[9] It should be noted that the act went further than the codes, making no distinction between "on" and "off premises" retail establishments. Because the various practices referred to in Section 5(b) are prohibited only if they have the effect of inducing the retailer to purchase the products of the vendor to the exclusion in whole or in part of competing products, complete ownership of a retail establishment would not involve a violation as the inducement feature could not be present, while partial ownership might result in a violation.

The states quite generally adopted more direct and effective prohibitions against the ownership and control of retail establishments. The practice has been the subject of regulation in the following jurisdictions—Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas (3.2 beer only), Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia.

Some of the states have adopted the code distinction between retailers selling alco-

[9] These subsections, under §5(b) entitled "Tied House," make it unlawful for the persons enumerated in ¶ 1 of note 8 *supra:* "To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business."

holic beverages for consumption on the premises and package stores, the prohibitions applying only to the on-premises establishments. Many of the state statutes not only prohibit an interest in retail establishments but also prohibit a holder of one class of permit from holding an interest in the business conducted under any other class of permit. Such laws, for example, would prohibit a distiller from owning an interest in a wholesale establishment.

In the matter of the furnishing of things of value to retailers, the provisions of the codes, the federal statute and the state laws vary extensively in detail but are similar in principle. They reveal that the legislatures and the administrative agencies have found it difficult to draw a dividing line between articles which might be furnished without serious danger of creating a tied-house condition and those which are likely to create a tied-house condition. The difficulty is accentuated by the fact that it is frequently impossible to ascertain when a certain concession is merely a price reduction and when it is the giving of money or something of value. The latter aspects will be discussed later in connection with prices.

The code provisions relating to malt beverages dealt more strictly with the furnishing of things of value than did those relating to distilled spirits and wine. They prohibited the furnishing, giving, or lending of "any money or other thing of value" to on-premises retail establishments, the furnishing, giving, lending, or renting of equipment, fixtures, or supplies to on-premises retail establishments, the furnishing of inside or outside signs costing more than $100 in any one calendar year to on-premises retailers, the offering of any prize, premium, gift, or other similar inducements to trade or consumer buyers and the payment of any allowances or rebates, concessions or discounts in the form of money or otherwise not conforming with the prices and terms of sale as posted by the producer or manufacturer.

In the Federal Alcohol Administration Act, Congress made no distinction between the things which may be furnished by producers dealing in malt beverages and those dealing in other types of alcoholic beverages nor did it make any distinction between on-premises and off-premises retail establishments. Section 5(b)(3) prohibits the inducement of a retailer for the purposes and under the conditions stated by "furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Administrator shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection."

The exceptions promulgated by the Administrator and contained in Regulations, No. 6, permit the furnishing of tapping accessories, signs for inside use, provided the cost does not exceed more than $10 at any one time, carbonic acid gas or ice, coil cleaning services, a limited advertising service mentioning a retailer's name in an inconspicuous manner, consumer advertising specialties, and retailer advertising specialties, which are primarily valuable to the retailer as point of sale advertising media, samples not to exceed one pint to a retailer who has not previously purchased

the particular product, newspaper cuts and, in the case of persons engaged in other lines of business, general merchandise such as groceries and drugs, provided they are not sold in combination with alcoholic beverages.

Louisiana, Nevada, North Carolina, North Dakota, Oklahoma, and Vermont are the only states which have not adopted some prohibitions similar to those of Section 5(b)(3) and Regulations, No. 6. The state prohibitions, however, vary materially as to the extent of allowable donations. With regard to signs, for example, some states permit indoor or outdoor signs up to $100 in value; others prohibit indoor and outdoor signs completely. Others follow the $10 limitation of the federal statute, while still others limit the signs by area. Indiana, which has spelled out in great detail the things of value which may not be furnished, prohibits signs if in plain view of a passerby and prohibits window displays and prohibits brand signs which are "so elaborate as to constitute interior decorations or which are so costly as to indicate subsidy."[10] Kentucky permits the furnishing of exterior brand signs costing $150 to retailers in cities of the first and second class.[11] In Maryland the Criminal Court of Baltimore on December 8, 1939 held in *State v. Harrison*[12] that where the purpose of the sign is to advertise the business of the wholesaler generally and not the business of the retailer, Section 28, Article 2B of the General Laws is not violated. The section makes it a violation "to furnish any sign . . . in value in excess of Five Dollars. . . ." The case involved the furnishing of a whisky sign to a retailer of beer and wine.

On May 20, 1937, the Massachusetts Alcoholic Beverage Control Commission ordered brewers and distillers "to cease loaning signs to retail licensees," stating: "One of the basic principles underlying the provisions of the liquor control act is that there shall be a complete disassociation between brewers and retail licensees and distillers and retail licensees . . . facts disclosed at the conference show that brewers have loaned signs to retail licensees of value well in excess of a quarter of a million dollars. Such a situation, if permitted to continue, will lead to the so-called 'tied-house' control of the entire industry." The release was issued on the basis of Regulations, No. 18, which provides in part that "No licensee shall offer any prize, premium, gift, or other similar inducement except advertising novelties of nominal value to aid or promote the sale of alcoholic beverages." On June 16, 1937, the Commission revised its opinion and held that the regulation did not apply to the lending of signs advertising the products of the manufacturer. On March 17, 1938 the Commission held that the making of cash contributions to a retailer for a sign was "in direct violation of the regulations. . . ." It stated: "there is a vast difference between a manufacturer or wholesaler and importer making an outright contribution of any sum of money to help defray the cost of a sign and the practice of manufacturers and wholesalers and importers of loaning signs which advertise their products as well as the retailers' establishments."

[10] Regs. 1, §5(b) (June 21, 1938). [11] Reg. LCB-2, (July 20, 1938).
[12] Abstract of oral opinion, Balt. Daily Record, January 19, 1940.

In those cases in which the statute prohibits the furnishing of exterior signs to retail establishments, the question arises as to when a particular sign on the side wall or roof of a building is merely a billboard of value to the advertiser or a sign calling attention to the retail establishment. The divergent treatment of the sign problem and the variety of interpretations of similar statutes and regulations indicate the need for cooperation between the states.

The extent to which retailer and consumer advertising specialties may be furnished to retailers in the various states is also without uniformity. The Idaho Beer Law[13] makes it unlawful for a brewer or a wholesaler, directly or indirectly, to aid or assist any licensed retailer by gifts, loans of money, property of any description or services of any nature. This Section was interpreted on March 5, 1940 in a notice to brewers and beer wholesalers to prohibit the furnishing of "novelties of all kinds, as well as beer trays, ash trays, menus, etc." Some states require all such novelties to be approved by the administrative agency involved, merely prohibiting the furnishing of such novelties as are not of nominal value, while others have no restrictions whatsoever. Others prohibit the furnishing of any articles which tend to influence purchases.

The codes contained prohibitions against paying, crediting, or otherwise compensating a trade buyer for an advertising, display, or distribution service. This prohibition was adopted as Section 5(b)(4) of the Federal Alcohol Administration Act[14] with the modification that it applied only to payments to retailers for advertising, display, or distribution services furnished to retailers and did not apply to such payments made to wholesalers. Prohibitions against this practice are contained in the laws or regulations of Alabama, Arizona, California, Connecticut, Georgia, Kentucky, Michigan, Minnesota, Missouri, New Mexico, Oregon, Pennsylvania, Texas, and Utah. In some of these states the prohibition applies only to on-premises retail establishments. General language in the statutes and regulations of other states appears to be broad enough to cover payments for advertising, display, or distribution services.

Section 5(b)(5) of the Act, which prohibits the inducement of a retailer "by guaranteeing any loan or the re-payment of any financial obligation of the retailer" had its origin in the code provisions relating to malt beverages. They applied only to on-premises retailers, while the statute applies to both on-premises and off-premises retailers. Provisions which would accomplish approximately the same result are present in many of the state statutes, among them Alabama, Arizona, California, Colorado, Kentucky, Maine, Minnesota, Texas, Utah, Washington, and Wyoming. A number of other states have provisions prohibiting the rendering of financial assistance which would be broad enough to cover cases falling within Section 5(b)(5) of the federal statute.

[13] Idaho Laws 1935, c. 132, §6(a), as amended by Laws 1939, c. 242.

[14] The subsection reads "(4) by paying or crediting the retailer for any advertising, display, or distribution service."

The codes provided for the posting of prices and terms of sales. There was, however, no specific regulation of the credit which might be extended by the manufacturer, importer, or wholesaler to retailers. Apparently recognizing that the extension of credit was an effective means of tying a retailer, Congress enacted Section 5(b)(6) which specifically prohibits the inducement of a retailer "by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Administrator and prescribed by regulations by him." In Regulations No. 8, the Administrator found the usual and customary credit period to be thirty days. State credit regulations vary materially.

There are inherent difficulties in the enforcement of any credit regulations which do not restrict sales to retailers who are in default. The problem has been met by many of the states by requiring vendors to report to the administrative agency involved the names of all retailers who have failed to pay their accounts in full at the termination of the credit period specified. The regulations and statutes of some states prohibit the creditor from selling to a retailer who is indebted to him for more than the period specified but permit other wholesalers to sell to the delinquent retailer. Still others go further and make it a violation for any licensee to sell to a retailer who is indebted to any licensee. The periods vary from ninety days to immediate payment.[15]

[15] Alabama requires sales for cash only. Arizona permits no credit. Arkansas requires all sales to be made for cash and abolishes a right of action for merchandise sold on credit. California authorizes the Board to fix the terms of credit. Connecticut has a 30 day credit limitation and makes it a violation for anyone to sell to a delinquent retailer with knowledge of such delinquency. Delaware requires retailers to pay their accounts in full by noon of the Saturday of the week following delivery. Florida permits the extension of credit in the "usual course of trade" in regard to liquor but requires cash transactions in regard to beer. In Georgia malt beverages may be sold for cash only, while 30 day credit is allowed in the case of distilled spirits, the State requiring reports by wholesalers as to the names of delinquent retailers. No wholesalers can do business with delinquent retailers. Idaho requires that beer sales be made for cash only. Illinois has a 90 day credit period. In Indiana all beer sales must be made for cash, but 15 days credit is allowed for liquor. Wholesalers may not sell to delinquents. In Kansas 3.2 beer may not be sold on credit. Maine requires sales to be for cash only. In April, 1938, Maryland held that the granting of credit for more than 30 days was considered a gift or gratuity within the meaning of the statute but made no provision prohibiting wholesalers from selling to delinquent retailers. On December 1, 1938, the State found that the system did not work and required that all sales to delinquents be for cash only. Massachusetts allows 90 days. Michigan requires that all malt beverages be sold for cash. Minnesota has a 30 day provision. Missouri requires payment within 30 days of the invoice date and denies renewal of retailers licenses if their accounts are not fully paid. Nebraska has a 90 day provision, while New Hampshire requires payment within 10 days. The New Jersey Alcoholic Beverage Law gives the Commissioner the power to regulate "sales on credit." In New Mexico a wholesaler must sell for cash to a retailer who is indebted to him for more than 30 days. The extension of credit is regarded as a "service." New York requires payment of all accounts by the tenth of the month following delivery. The state mails a list of all delinquents to the trade, who may sell only for cash until the name is removed from the next monthly list. In Ohio beer sales must be for cash and a right of action to collect is abolished if sales were made on credit. Oregon requires all sales of wine and malt beverages to be for cash and can order the violating wholesaler to discontinue all sales to the delinquent retailer for a period deemed proper by the commission. In Pennsylvania, malt beverages may be sold for cash only. Rhode Island, which fixes a 15 percent mark-up for the wholesaler and provides for quantity discounts, provides that the discounts shall not be allowed unless the account is paid within 30 days. South Carolina requires payment within 15 days and all delinquents must be reported to Tax Commission, which circularizes their names. All wholesalers are forbidden to make further sales to such retailers. Lists are issued weekly.

Closely related to credit regulation are the prohibitions against the sale of merchandise on consignment or with the privilege of return. In both types of transactions the retailer receives financial assistance likely to obligate him to his benefactor. Section 5(d) of the Federal Alcohol Administration Act,[16] which had its origin in the codes, prohibits such transactions even though they do not "induce" within the meaning of Sections 5(b), and (c). Consignment sales to wholesalers as well as such sales to retailers are prohibited. The recipient of the merchandise is also guilty of a violation. A comparatively small number of states have adopted specific prohibitions against selling on consignment.[17] Such a prohibition would not appear to be necessary where credit is prohibited. Credit limitations would not, however, operate to restrict the sale of merchandise with the privilege of return.

All of the codes of fair competition in the alcoholic beverage industries and those of many other industries contained prohibitions against commercial bribery with slight variations in language. Section 5(c) of the Federal Alcohol Administration Act[18] prohibits the inducement of a retailer or a wholesaler by commercial bribery in the conventional sense, *i.e.*, the giving of remuneration to employees without the knowledge of the employer, and also by offering or giving a bonus, premium, or compensation to officers, employees, or representatives of the trade buyer with the

Tennessee requires payment in ten days and sales may be made to delinquents only for cash. The Attorney General of Texas has ruled that the Texas Liquor Control Board does not have power to restrict credit terms. Vermont prohibits the sale of wine or beer on credit. Virginia requires that beer sales be made for cash. Beer and liquor sales in Washington must be for cash. The Board has the power to withhold licenses from wholesalers who have not collected their accounts. West Virginia requires beer sales to be for cash and abolishes a right of action for sales on credit. In Washington, the Legislature by a Joint Resolution attempted to empower the State Treasurer to set up credit limitations but the Attorney General held that this "resolution" did not accomplish its purpose as it had not been signed by the Governor and was not a law. In Wyoming sales may be made for cash only.

[16] The section reads: "(d) Consignment sales: To sell, offer for sale, or contract to sell to any trade buyer engaged in the sale of distilled spirits, wine, or malt beverages, or for any such trade buyer to purchase, offer to purchase, or contract to purchase, any such products on consignment or under conditional sale or with the privilege of return or on any basis otherwise than a bona fide sale, or where any part of such transaction involves, directly or indirectly, the acquisition by such person from the trade buyer or his agreement to acquire from the trade buyer other distilled spirits, wine, or malt beverages—if such sale, purchase, offer, or contract is made in the course of interstate or foreign commerce, or if such person or trade buyer engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such sale, purchase, offer, or contract is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such trade buyer in interstate or foreign commerce: Provided, That this subsection shall not apply to transactions involving solely the bona fide return of merchandise for ordinary and usual commercial reasons arising after the merchandise has been sold."

[17] Ark., Cal., Del., Fla., Ga., Mass., Minn., N. J., N. M., Tex., Utah.

[18] The section reads: "(c) Commercial bribery: To induce through any of the following means, any trade buyer engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such trade buyer in interstate or foreign commerce: (1) By commercial bribery; or (2) by offering or giving any bonus, premium, or compensation to any officer, or employee, or representative of the trade buyer."

knowledge of the employer.[19] The following states contain prohibitions aimed at the practice—Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Kentucky, Maine, Michigan, Minnesota, New Mexico, Oregon, Pennsylvania, Texas, Utah, and Washington. In some of the states commercial bribery is not spelled out as a separate offense but the general prohibition against the furnishing of things of value to retailers includes prohibitions against furnishing things of value to their employees.

In nearly all of the trade practice provisions there is an important distinction to be noted between the treatment of the problem by the state and federal governments. Because the states have immediate control over the operations of the retailer, the laws and regulations dealing with illegal transactions between retailers and their vendors quite generally make such transactions violations by both parties. With the exception of violations under Section 5(d) of the federal statute, retailers are not subject to its trade practice provisions.

JURISDICTION

The jurisdictional provisions of Sections 5(a), "Exclusive Outlet," 5(b), "Tied House," and 5(c), "Commercial Bribery," are involved and redundant. In each of them practices are proscribed only if they cause the retailer or trade buyer, as the case may be, to purchase the products of the person engaging in the practices "to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce." This fundamental element, essential to the finding of a violation, is further qualified in each of the sections in question by a requirement that one of three alternative jurisdictional conditions be satisfied: (1) If the requirement or transaction is in interstate or foreign commerce; (2) if the practice is engaged in "to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce"; or (3) "if the direct effect" of such requirement (or inducement) "is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer" (or trade buyer) "in interstate or foreign commerce."

It would seem that if the first alternative were present the transaction would be within the field of federal power and Congress would not have had to rely upon the

[19] The distinction between §5(c)(1) and 5(c)(2) was recognized in American Distilling Co. v. Wisconsin Liquor Co., 104 F. (2d) 582 (C. C. A. 7th, 1939) in which the defendant contended that its contract of purchase from the plaintiff was illegal and unenforceable because among other things, plaintiff had given money and gratuities to salesmen of the defendant in violation of the Federal Alcohol Administration Act. The Court said at 585: "Section 205(c) 27 U. S. C. A. [Section 5(c) of the Act] denounces two practices, (1) commercial bribery, and (2) the offering or giving of any bonus, premium, or compensation to any officer, or employee or representative of the trade buyer. The Act does not define 'commercial bribery' and its intended meaning must be sought in its normal meaning and usage. . . .

"The vice of conduct labeled 'commercial bribery' as related to unfair trade practices, is the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers." The court held that as the gifts were not made secretly they did not constitute "commercial bribery." It said, however, "But when Congress adds to the practice of 'commercial bribery' the 'offering or giving of any bonus, premium or compensation,' we see no justification for our imposing qualifying adjectives. . . ." As the case was decided on other grounds, the pronouncement on the distinction between Section 5(c)(1) and 5(c)(2) is dictum but the distinction appears sound.

requirement that the practice exclude "in whole or in part" products "sold or offered for sale in interstate or foreign commerce." It would seem that if the second and third alternatives are present the fundamental element would necessarily be present. The Administrator of the former Federal Alcohol Administration on three occasions recommended to Congress legislation which would have cured the redundancy.[20] A bill for the purpose was introduced in 1939 but was never passed.[21]

Federal jurisdiction over practices in the malt beverage industry is materially curtailed by the provisions of the next to the last paragraph of Section 5 of the act.[22] The statute applies, in the case of malt beverages, only to transactions in interstate commerce and then only if the laws of the state where the retailer is located contain prohibitions similar to those of the federal statute.

The alcoholic beverage industry is organized on a national and highly competitive scale, making it an appropriate subject for federal regulation. In 1938 four large distilling companies doing a national business produced 64% of the total whiskey production. They held 54% of all stocks of whiskey in bonded warehouses and held 78% of the total stocks of whiskey four years old and over remaining in bonded warehouses.[23]

Sales are made through wholesalers, whose policies are, for the most part, dictated by producers. "Missionary men" of the manufacturer attend meetings of the salesmen of the wholesaler and call on the retail trade independently or with the wholesaler's salesmen, in some cases taking orders for the wholesaler and offering concessions and inducements directly to the retail trade. Special deals offered by the wholesaler are generally ordered by the manufacturer who demands that wholesalers holding franchises under him comply strictly with his sales policies.

The keenest competition is between the nationally advertised brands of the large producers who cover the United States with vast sales and promotional organizations. There is also competition from the smaller producers, many of whom place on the market private brands bearing the name of a wholesaler or retailer. They compete with the nationally advertised brands on price but they cannot displace nationally advertised products, which every retailer must carry to satisfy his trade. Because of the nature of the organization of the industry and the nature of the competition, there is a very real effect on interstate commerce when a producer, to strengthen his position in a particular market, engages in the practices proscribed in the act.

While it might seem that a fifty cent gift by missionary men to a bartender might not have a direct or substantial effect on interstate commerce, the effect is substantial and immediate when such gifts are given as a matter of sales policy throughout a

[20] ANN. REPS. (1937, 1938, 1939). [21] H. R. 6219, 76th Cong., [illegible] Sess. (1939).

[22] It reads: "In the case of malt beverages, the provisions of subsections (a), (b), (c), and (d) shall apply to transactions between a retailer or trade buyer in any State and a brewer, importer, or wholesaler of malt beverages outside such State only to the extent that the law of such State imposes similar requirements with respect to similar transactions between a retailer or trade buyer in such State and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be."

[23] *Hearings before the Temporary National Economic Committee of Congress*, 76th Cong., 2nd Sess. (1939) Exhibits 400, 401, 402.

given territory. The competition for the friendship and good will of retailers and their employees is intense and producers who decide to make an impression on a particular market spend large sums to accomplish the result.

While most of the states attempt to control the practices of out-of-state producers through prohibitions against the receipt of inducements by retailers and through their control of wholesalers within their borders and in some cases through the licensing of missionary men, the states have no effective jurisdiction and no opportunity to investigate the operations of the shipper responsible for promotion policies. While in some cases the states have been able to bar products of certain producers from their borders for limited periods because of violations by their agents, divergent enforcement measures by individual states are an ineffective curb to illegal promotional campaigns carried on on a sectional or national basis. The problem is primarily a federal one.

In the beer field there is little opportunity for effective federal enforcement because of the limitations on jurisdiction imposed by the next to the last paragraph of Section 5. Probably the most serious practices in the beer field are those involving the furnishing of bars and dispensing equipment to retailers indirectly through closely associated equipment houses.

Producers and wholesalers of distilled spirits and wine have sought to gain the favor of retailers principally through the furnishing of less expensive articles of equipment, signs and devices which fall more nearly within the category of retailer advertising specialties. The problem in this field is primarily one of determining where the dividing line is to be drawn.

GIFTS OF MONEY AND PRICE CONCESSIONS

A much more fundamental difficulty exists in connection with the very broad language employed in the federal statute and in many of the state laws. Quite generally, they contain provisions against the furnishing of money or other things of value. This prohibition is so closely related to price that the line of demarcation, in many cases, is difficult to draw. In the codes the prohibitions against the giving of "rebates, refunds, concessions, or discounts, whether in the form of money or otherwise" were contained in the provisions relating to the posting of prices. The codes made no effort to fix prices but they required that an industry member declare his prices and live up to them. The Federal Alcohol Administration Act contains the broad prohibition against the giving of "money . . . or other thing of value" but Congress discarded the price-posting provisions.

The same situation exists in many of the states. In such jurisdictions a basis for distinguishing price concessions from gifts of money is sometimes difficult to find. The case in which a vendor hands a retailer a \$2.00 bill to induce him to purchase a \$20.00 case of liquor would seem to involve a gift of money to the retailer as an inducement. If, instead of giving the retailer money, the vendor gives him a \$2.00 bottle of merchandise and invoices the case at the usual price, the extra bottle being

represented as a gift, it might be argued that something of value was given to the retailer.[24] Does the fact that the extra merchandise is not represented as a gift change the character of the transaction? A few distillers have attempted to evade the prohibitions of the various jurisdictions on this point by packaging their liquor in cases containing thirteen or fourteen bottles instead of the conventional twelve bottle case.

The producer, in formulating deals for limited periods in order to strengthen his position in a given market, would much prefer to offer free merchandise to the trade, while maintaining his unit case price, than to reduce the case price for a limited period. This latter method, it may be observed, would clearly be permissible under the federal statute and many of the state statutes. The producer's reasons for the preference appear to be twofold. First, the retailer, like the gullible consumer, likes to feel that he is getting something for nothing. The second and probably the most important reason is that the producer desires to maintain his case price. A price reduction, though announced as temporary, leads the trade to expect a permanently lower price.

[24] The New York courts have taken a different view. The Alcoholic Beverage Control Law, §101(1-c), makes it unlawful for a manufacturer or wholesaler "to make any gift or render any service . . . which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler." The evidence in Pennsylvania Whiskey Distributing Corp. v. Bruckman, 256 App. Div. 781, 11 N. Y. S. (2d) 718, 720 (1939), established that the manufacturer had sold ten barrels of whiskey to retailers, the salesman agreeing "to supply 'free' one extra barrel." The State Liquor Authority alleged that this was a gift within the meaning of the statute. The Appellate Division said, "A 'gift' is a voluntary transfer of property without any consideration or compensation therefor (Gray v. Barton, 55 N. Y. 68; McKenzie v. Harrison, 120 N. Y. 260; Matter of Van Alstyne, 207 N. Y. 298). A sale is defined as any transfer of title or compensation or both for a consideration. (Matter of Sears, Roebuck & Co. v. McGoldrick, 279 N. Y. 184). If, then, the additional barrel of whiskey was furnished in consideration of the purchase of ten other barrels, how can it be said to constitute a 'gift' made without consideration. In theory, the arrangement consisted of a collateral agreement by which the petitioner undertook to supply the additional barrel of whiskey in consideration of the purchase of ten other barrels. (Mitchell v. Lath, 247 N. Y. 377). Considered more realistically, it was the sale of eleven barrels for the price of ten (Compare, People v. Miller, 271 N. Y. 44; People *ex rel.* Ellison v. Lavia, 179 N. Y. 164, 168). Although it is true, no doubt, that an additional barrel would, in the language of the statute, 'tend to influence such licensee to purchase the product of such manufacturer or wholesaler,' as would a reduction in the purchase price, that is not an offense under the statute unless it is accomplished through the medium of a 'gift.' The practice at which the statute appears to have been directed was the furnishing of free liquor, in large or small quantities, in order to influence the patronage of retailers. It was not intended to regulate the price at which liquor might be sold by prohibiting a reduction in price resulting from a contract to deliver a large quantity of liquor." The decision was upheld by the Court of Appeals, 282 N. Y. 665, 26 N. E. (2d) 804 (1940).

If the theory advanced by the court that the free merchandise could not be a gift because it was consideration for the purchase of the ten barrels is sound, a gold watch furnished to each purchaser of a specified quantity would not be a gift. It would seem that the decisions have nullified to a large extent the intention of the legislature. The statute proscribes only those gifts which influence sales. Under the language of the decision articles supplied free with whisky would cease to be "gifts" because they had the very result essential to the finding of a violation. The only transaction covered by the act as interpreted would be where an article or money was furnished free and it later resulted in a purchase as an entirely separate transaction. So interpreted, the statute does not cover the prevalent practices at which it was aimed. A broader interpretation of "gift" in this particular statute would appear to be sustainable in view of the provision that they must influence sales and in view of the fact that such influenced sales would in almost all cases constitute consideration.

In American Distilling Co. v. Wisconsin Liquor Co., *supra* note 19, it was stated, at 585, that a free case of liquor was in fact a quantity discount and not a gift. The statement was dictum. See also 123 A. L. R. 748 (1939).

Where the state laws require the posting of prices to retailers, as was the case in the codes, the administrative agency can take the position that any concessions not conforming to the declared prices would constitute the giving of something of value. Legislation requiring all terms of sale to appear on the invoice and prohibiting all concessions which do not appear offers an opportunity for an agency to take the position that all such secret concessions involve the giving of money or something of value. Whether a concession is a gift or a price reduction makes little real difference, yet because of the language of many of the statutes the distinction must be drawn.[25]

The practice of producers of offering free deals, discounts, and secret rebates in license states to strengthen a brand was of serious concern to the monopoly states, which paid list prices. The problem became so acute that in 1937 the Monopoly Group of the National Conference of State Liquor Administrators decided to purchase only under a warranty by the vendor that they were receiving "the lowest base price." The following year when the monopoly states organized the National Alcoholic Beverage Control Association it agreed upon a similar warranty for "the lowest net base price."[26]

PRICE STABILIZATION

(a) In General

While many of the state so-called fair-trade acts would be broad enough to enable a producer to regulate the price at which the wholesaler sold to the retailer, they are not generally used for this purpose. Their primary function is to establish a uniform resale price to the consumer. The state fair-trade acts generally provide that a contract relating to the sale or resale of a commodity bearing a trade-mark or brand name which is in fair and open competition with commodities of the same general class produced by others, shall not be deemed in violation of the anti-trust or other laws of the state because they contain provisions requiring the purchaser to resell at or above a stated price or to obtain agreements from his vendors that they in turn

[25] The Robinson-Patman Act, *supra* note 5, designed to prevent discrimination among buyers of the same class, has a direct bearing on the practice of giving free deals and secret rebates to retailers. The statute, which amended the Clayton Anti-Trust Act, and also contained separate distinct provisions, makes it unlawful in interstate commerce "to discriminate in price between different purchasers of commodities of like grade and quality." §2(d) makes it unlawful for any person engaged in commerce "to pay or contract for the payment of anything of value to or for the benefit of a customer . . . as compensation or in consideration for any services or facilities furnished by or through such customer in connection with . . . the sale or offering for sale" of the products of the vendor "unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities." Sec. 2(e) makes it unlawful to furnish discriminatory services or facilities to the purchaser.

While there are similarities between these provisions and those of the federal and state statutes prohibiting the furnishing of money, services, or things of value, such practices are prohibited by the Robinson-Patman Act only when they are not equally available to all persons of the same class, while most of the liquor control statutes prohibit such inducements even if they are available to all customers of the same class. The distinction between prices and gifts must therefore be drawn. It is probable that many violations of the liquor statutes on this subject also involve violations of the Robinson-Patman Act, as discrimination is frequently present.

[26] *T. N. E. C. Hearings*, *supra* note 23, at 2574.

will resell at or above the stipulated price.[27] Exceptions are provided for in the case of close-out sales, sales of damaged goods, and sales under court orders. By explicit terms horizontal agreements between producers, or between wholesalers, or between retailers are not under the protection of the statutes.

The acts generally contain a provision making it unfair competition for a person to sell at a price lower than the stipulated price, even though he is not a party to the contract, if he has knowledge of such a contract. Such sales are actionable at the suit of any person damaged. The provision requiring non-contracting parties to abide by resale prices fixed by contract was upheld by the Supreme Court in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*[28] and *McNeil v. Joseph Triner Corp.*[29] The Court stated in the *Seagram* case that §2 of the Illinois Act imposing an obligation on non-contracting dealers "does not deal with the restriction upon the sale of the commodity *qua* commodity, but with that restriction because the commodity is identified by the trade-mark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in the forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end and not as an end itself."[30]

Fair-trade contracts are expressly legalized under fair-trade acts in 44 states. There are no such statutes in Delaware, the District of Columbia, Missouri, Texas, and Vermont. Such contracts are, however, legal in all jurisdictions except Missouri, Texas, and the District of Columbia. Obviously in Delaware and Vermont where the contracts are legal merely because there are no laws prohibiting them and not because of affirmative legislation, non-contracting dealers are not required to abide by established prices.

Prior to the passage of the Miller-Tydings Act[31] as an amendment to the Sherman Anti-Trust Act, the Supreme Court held in *Dr. Miles Medical Co. v. Park & Sons Co.*[32] that the Sherman Act prohibited vertical price maintenance agreements between producers and distributors as well as horizontal agreements. The Federal Trade Commission Act prohibiting "unfair methods of competition" was also construed to prohibit such agreements in interstate commerce.[33] The Miller-Tydings Act amending Section 1 of the Sherman Anti-Trust Act provides "that nothing herein contained shall render illegal contracts or agreements prescribing minimum prices for resale of a commodity which bears, or the labels or container of which bears the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, if contracts or agreements of that

[27] For a discussion of the various types of contracts see C. C. H. Trade Reg. Serv. ¶577.

[28] 299 U. S. 183 (1936).

[29] *Ibid.*

[30] *Id.* at 193.

[31] 50 STAT. 693 (1937), 15 U. S. C. §1.

[32] 220 U. S. 373 (1911).

[33] Fed. Trade Comm. v. Beech-Nut Packing Co., 257 U. S. 441 (1922).

description are lawful as applied to intrastate transactions under any statute, law or public policy now or hereafter in effect in any state. . . ." It is to be noted that the Miller-Tydings Act validates only such contracts or agreements and makes no reference to the statutory obligation imposed by the various states on non-contracting parties to maintain resale prices fixed in contracts between others.

As the liability imposed on a non-contracting party is purely statutory and as a state can have no jurisdiction beyond its borders, it has been suggested that the provisions of a state's fair-trade act relating to non-contracting dealers may not apply in general commodities to interstate sales.[34] Whether or not this view is sustainable as to general commodities, it is probable that in the case of alcoholic beverages, because of the increased power of the states in regard to liquor under the Twenty-first Amendment, states could impose liability on non-contracting parties within the state though they bought in interstate commerce.

It is customary to negotiate fair-trade contracts with a large number of retailers in a given trading area. It would seem that if a single contract and notice are enough to place a fair-trade act into operation and impose obligations upon non-contracting parties within the state, as was held in *Revlon Nail Enamel Corp. v. Charmley Drug Shop*,[35] all retailers but the original contracting retailer are bound by statute to sell at the resale price and therefore any agreement by them to do what they are already obliged to do would not constitute consideration for the contracts.

The question is academic as to intrastate sales for it would merely mean that suits against all but the first contracting price cutter would have to be brought under the statutory right of action rather than under contract. If, in the interstate situation, contracting parties only are obliged to sell at the established resale price,[36] contracts subsequent to the first contract would be valid as the retailer would then be agreeing to do something which he was not obligated to do under state law and all suits against him would have to be on the contract theory.

(b) Application in Alcoholic Beverage Field

It has been seen that in the codes the provisions against the giving of money and other concessions were incorporated in price-posting provisions and were designed to make them effective. Similar implementing provisions against gifts and concessions are contained in many of the fair-trade price laws "for the purpose of preventing evasion of the resale price restrictions."[37] A secondary effect of the fair-trade acts is, therefore, to support tied-house legislation in the liquor field. Similar support comes from the so-called unfair practice acts prohibiting sales below cost.

This was only one of the reasons, and perhaps a minor one, which led to the rapid adoption of price stabilization legislation in the industry. Vicious and frequent price wars among retailers, vigorous competition among manufacturers and wholesalers plus the growing power of organizations of retailers looking for stabilization and

[34] C. C. H. Trade Reg. Serv. ¶580.30.

[35] 123 N. J. Eq. 301, 197 Atl. 661 (1938).

[36] *Supra* note 34.

[37] See GEORGIA FAIR TRADE ACT, Laws 1937, No. 100.

greater profits, coupled with a realization by the states that in the field of liquor they were not subject to as many constitutional restrictions because of their increased powers under the Twenty-first Amendment, led to bold and drastic experiments in price control.

Price posting, regulation by private associations, mandatory resale price maintenance contracts, price fixing by the state, floors under prices and roofs over them, regulation of mark-ups, control of prices by administrative discretion, and elaborate combinations of these measures have been adopted. Because the experiments came at a time when neither the fair-trade law nor the constitutional law on liquor was settled, and because federal jurisdiction is affected by the laws of the individual states in both of these fields of law, there is uncertainty as to the validity of much of this legislation.

Eighteen states have independent price stabilization legislation written into the alcoholic beverage statutes. Where there is no such legislation relating specifically to liquor, that commodity is treated like any other under the conventional price stabilization acts. The most popular special price legislation in the alcoholic beverage field is that which prohibits the sale of alcoholic beverages in a state unless it is sold pursuant to fair-trade contracts. Arizona, Arkansas, California, Georgia, Indiana, Kentucky, Minnesota, New Mexico, Oregon, and South Carolina have such provisions. In some of the states contracts must be approved by administrative officers; in a number of them filing of a contract on a brand by one dealer excuses the others from filing; in others the contracts need not be filed, but the prices must be posted with the authorities. Publication is sometimes required in trade papers and in a number of states all parties affected must be notified individually. Some provide for maximum periods before prices can be changed. Some specifically include private labels while many of them follow the conventional pattern and make the fair-trade acts applicable only to merchandise in competition.

Arizona prohibits the sale of any distilled spirits or wine, including private brands, in the state, except pursuant to the fair-trade contract approved by the Superintendent of the Department of Liquor Licenses and Control.[38] Failure to sell at the fair-trade price is grounds for suspension or revocation. Written permission may be obtained for close-out sales at lower prices, but if denied, the wholesaler, owner, or producer is required to repurchase the merchandise from the retailer closing out his business. Arkansas has similar provisions.[39] All wholesalers must be notified of prices,[40] which do not become effective until ten days after filing with the Commissioner.[41] A wholesaler must maintain stock on his shelves for ninety days before he can apply to post a lower price.[42]

California prohibits the sale of distilled spirits, including private brands, except pursuant to fair-trade contracts and requires filing of contracts with the State Board

[38] Reg. 4 (Jan. 1, 1940).

[39] Reg. 21 (Aug. 31, 1938).

[40] Sup. Reg. 23 (Dec. 1938).

[41] Acts 1939, No. 352, §4.

[42] Sup. Reg. 25, (May 31, 1939).

of Equalization, the publishing of prices in a trade journal and notification to licensees.[43] The filing on a brand by one licensee excuses others from filing. Separate prices for northern and southern California are permitted. Close-outs below stipulated prices are permitted on application only after the merchandise has been in the state for six months.

The relationship between the prohibitions against giving things of value in the tied-house statutes and the fair-trade acts is illustrated by a quotation from the resolution of the California State Board of Equalization preceding the adoption of the regulation above referred to: "Whereas, producers and distributors of distilled spirits have resorted to price cutting, price discrimination, commercial bribery, gifts of free goods, and dumping in an effort to obtain an even greater volume of sales . . . now therefore . . . it being the further judgment of the Board that the following rule will tend to curb the evils complained of, the same is hereby adopted."

Georgia requires all distillers, rectifiers, importers, wholesalers, and retailers doing business in the state to enter into fair-trade agreements, which are "subject to the approval of the Commissioner of Revenue."[44] Wholesalers may apply for a right to sell liquor at quantity discounts ranging from 1% to 4% on quantities of from one to twenty-five or more cases. The right to collect this discount is forfeited if the accounts are not settled in fifteen days.[45]

Idaho requires all persons selling beer for resale to file price schedules and to sell at the scheduled prices, but there is no specific provision for resale price maintenance in the alcoholic beverage field.[46]

In order to enforce the provisions in the Alcoholic Beverages Act[47] prohibiting the furnishing of rebates, money, and other concessions, the Alcoholic Beverages Division of the State of Indiana, on April 4, 1940,[48] called attention to the requirement that prices be filed with the Division, stating "This arrangement was made with no idea whatever of fixing or controlling the level of prices but only with the idea of preventing rebating or the granting of special concessions. . . ."

Drastic provisions designed to stabilize prices are contained in House Bill No. 276, passed on March 26, 1940, by the Kentucky Legislature, without the approval of the Governor. The statute provides not only for mandatory fair-trade contracts but also for the fixing of mark-ups for various classes of trade buyers. All distillers, rectifiers, blenders, wholesalers, vintners, or retailers are required by Section 2 to enter into fair-trade contracts, giving wholesalers of liquor not less than a 15% mark-up, wholesalers of wine not less than a 20% mark-up and retailers not less than a 33⅓% mark-up in lots less than case lots and not less than 10% in units of one case or more. Section 2(d) provides that "any donations, free goods, bribery, or rebates of any character whatsoever which constitute any part of an inducement to purchase . . . shall be construed as a violation of the minimum mark-up resale prices herein pro-

[43] ALCOHOLIC BEVERAGE CONTROL ACT, Laws 1935, c. 333, §55.5, and Rule 42 (March, 1940).

[44] Distilled Spirits Regulations, (Aug. 1939), General Provisions, §1.

[45] *Id.* §13.

[46] Idaho Laws 1935, c. 132, §6(5).

[47] Laws 1935, c. 226, §32R.

[48] Bulletin 62.

vided." This provision indicates a merger of the fair-trade, the price-fixing, and anti-tied-house policies.

Mark-ups are to be computed on actual price, including all bottling charges, taxes, and transportation charges to be calculated on a minimum basis of twenty-five cents per case. Wholesalers are required to use invoices of substantially standard form and to file copies of fair-trade contracts with all retailers to whom they sell merchandise.[49] "Minimum values upon which the wholesalers' mark-up must be taken" are fixed by regulation,[50] in order "to make the Distilled Spirits and Wine Fair Trade Act applicable to private label merchandise."

Arbitrary minimum bottlers values are listed for products of various ages, proofs, and sizes, for the purpose of computing the wholesalers' mark-up. By this device a minimum price is established for private labels as well as for branded merchandise and bottlers of private labeled merchandise can not undermine branded merchandise by claiming low bottlers values for private brands.

Michigan, after experimenting with price posting[51] and minimum prices for malt beverages,[52] repealed the price-fixing provisions on January 31, 1940, without comment.[53] The minimum prices of wine to wholesalers and retailers, which were fixed as of October 14, 1938,[54] have not been repealed. Wineries and wholesalers were notified on January 16, 1940,[55] that sales below the minimum prices would constitute grounds for the revocation of licenses.

On July 15, 1938, the Liquor Control Commissioner of Minnesota notified all manufacturers, wholesalers, and retailers that they would be required to market their products under fair-trade contracts and that all manufacturers and owners of liquor brands were required to file with the Commissioner a list of brands and minimum ten case prices from the wholesaler to the retailer, as well as minimum resale prices to the consumer, the resale and bottle prices of the retailer to be not less than 33⅓% of the ten case price of the wholesaler.[56] Specific quantity discounts are permitted.

New Hampshire gives its Commission authority to investigate prices charged by wholesalers and retailers and to revoke the permit of any wholesaler or retailer after hearing if it finds "that the profit made from the sale of beverages by such permittee is unreasonable and excessive."[57]

In New Jersey the Commissioner is empowered to prohibit or regulate the sale of alcoholic beverages in violation of any fair-trade contract.[58] By regulation manufacturers or wholesalers who have entered into a fair-trade contract must file a copy of such contract with the Department of Alcoholic Beverage Control and must notify retailers as to the prices contained therein.[59] In *Gain v. Burnett*,[60] it was held that this regulation would be valid under the general powers of the Administrator with-

[49] Reg. F. T. 1 (July, 1940).
[50] Circular F. T. 4 (May 7, 1940).
[51] Bulletin 190-4 (Jan. 11, 1939).
[52] Bulletins 257-4 to 261-4 (Oct. 12, 1939).
[53] Bulletin 282-4 (Feb. 6, 1940).
[54] Bulletin 157-4.
[55] Bulletin 278-4.
[56] Circular letters Nos. 173 and 176 (July 15 and July 25, 1938).
[57] Laws 1933, c. 99, §31.
[58] Laws 1938, c. 208.
[59] Reg. 30 (Sept. 1939).
[60] 122 N. J. L. 39, 4 Atl. (2d) 37 (1939).

out the specific legislation in Chapter 208. It is also unlawful for any manufacturer or wholesaler to discriminate among retailers by offering discounts, rebates, free goods, allowances, or other inducements not offered to all retailers.[61] The Commissioner is empowered to provide for maximum concessions of this nature.

In New Mexico the fair trade act is substantially restated with additional drastic and complex price provisions in the Liquor Control Act of 1939.[62] It is provided that no beer or ale shall be sold unless uniform minimum fair-trade prices have been fixed governing the retail selling price,[63] but apparently the act contains no such provision in respect to other alcoholic beverages. Section 1304 provides that no fair-trade contract shall be held illegal, void, voidable, or unenforceable because it was made at the insistence or request of a wholesale liquor dealer or retail liquor dealer or an organization of wholesalers or retailers where the gross profit demanded in the retail selling price does not exceed 33⅓% based on the retailers' price. Contracts protecting a gross retail profit in alcoholic beverages except beer in excess of 33⅓% based on selling price are prohibited. Section 1306 prohibits fair-trade contracts protecting a wholesaler's gross profit in spirituous liquors in excess of 18⁴⁄₁₀₀% based on the wholesaler's selling price.

Under §1406 of the New Mexico law contracts between retailers are to be approved by the Chief of Division of Liquor Control providing the parties agree: (1) that they will sell at stipulated prices which do not permit a gross profit of more than 33⅓% based on the stipulated selling price or (2) that they will not buy articles which are not covered by fair-trade contracts for which minimum fair-trade prices have not been set, or (3) they will not buy articles on which minimum retail prices have not been fixed under the provisions of "This article protecting the New Mexico retail liquor dealers . . . in a gross profit. . . ." Section 1407 validates similar contracts among wholesalers provided that the agreements between them do not result in a gross profit to them of more than 16⅔% in respect to liquor and 33⅓% in respect to wine, based upon stipulated selling prices.

Section 1410(11)(b) expressly prohibits the sale or offering for sale of distilled spirits, wine, and malt beverages to the retailers at less than the cost thereof "with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, or of otherwise injuring a competitor. . . ." The statute elaborately defines cost of spirituous liquor to include taxes and incidental costs, plus either the purchase price or replacement cost, plus a mark-up "amounting to less than the minimum cost of operation in the handling of spirituous liquors at wholesale by the most efficient wholesale liquor dealer, which mark-up, in the absence of satisfactory proof to the contrary, made by the wholesaler before the sale to Chief of Division, . . . shall be 17⁵¹⁄₁₀₀%." The "net cost of wine to wholesalers" is similarly defined except that the mark-up in the absence of proof to the contrary is 34%. The *prima facie* mark-up used to determine the cost of spirituous liquor to the retailer

[61] Laws 1939, c. 87.

[62] Laws 1939, c. 236, arts. XIII, XIV.

[63] *Id.* §1303.

and the cost of wine to the retailer is fixed at 38⁸⁄₁₀%. The cost of beer to the wholesaler in the absence of proof to the contrary includes a mark-up of 20%. The cost of beer to the retailer in the absence of such proof includes a mark-up of 25%. Regulations No. 15 relating to minimum price contain elaborate requirements for establishing minimum cost of operation "less than the prima facie minimum cost of operation fixed by the statute."

The effect of Sections 1406 and 1407 is to permit horizontal price agreements below a stipulated maximum gross profit. The effect of Section 1410 is to prohibit sales below cost, including in the definition of cost an arbitrary mark-up over purchase or replacement cost to cover cost of doing business. The statute has the following unusual and drastic provisions: (1) It requires all beer to be sold under fair-trade contracts, while not requiring all liquor to be sold under such contracts, (2) it specifically permits groups of retailers to force vendors to sell under fair-trade contracts, (3) it places maximum limits upon the gross profits permissible under the fair-trade contracts, (4) it permits horizontal contracts among retailers and among wholesalers fixing uniform gross profits below certain maximums, and (5) it prohibits sales below cost, fixing arbitrary mark-ups, as cost of doing business, to be added to purchase or replacement cost of the article.[64]

North Dakota requires wholesalers to post prices to retailers as a tax rather than a price control measure.[65]

In Oregon wine must be sold pursuant to fair-trade contracts.[66] Persons selling beer for resale must abide by prices posted with the Commission,[67] while persons selling wine for resale may not sell below posted minimum prices.[68] At least one fair trade contract covering all brands must be made by a wine wholesaler who must notify all retailers.[69]

In Rhode Island the Division of Intoxicating Beverages has the power to fix wholesale prices of all intoxicating liquors.[70] By regulation[71] they are required to charge a price which will give them a gross profit of 15%, which price must be posted with the Liquor Control Administrator. The regulations specifically prohibit free goods, but provide for specified quantity discounts.

South Carolina requires that all brands be sold under fair-trade agreements and prohibits a wholesaler or retailer from possessing any brand not covered by such agreements.[72] Quantity discounts are specified.[73]

The Washington Liquor Control Board requires brewers and beer importers to post wholesale prices for all brands in various zones fixed by the Board.[74] Wineries

[64] It is to be noted that the gross profits which wholesalers and retailers are allowed to agree upon and demand are based upon their sales prices while the prima facie mark-up used as an arbitrary cost of operation is based upon purchase prices.

[65] Laws 1939, c. 242, §3.

[66] Reg. 6, §5(e).

[67] Reg. 10 A.

[68] Reg. 10 B.

[69] Circular letter (June 7, 1940).

[70] C. 164, §6, as amended by Senate Bill 232, (Apr. 27, 1940).

[71] Reg. 72 (July, 1937, amended Mar. 17, 1939).

[72] Reg. 6 (June 27, 1939).

[73] Reg. 7 (June 27, 1939).

[74] Reg. 49 (Oct. 1, 1939).

must also post prices but no zones are created.[75] Brewers and wineries are required to file a copy of all written transactions and memoranda of all oral agreements with their wholesalers relative to the terms of sales, discounts, advertising allowances, bonuses, or gifts. The granting of any quantity discounts even though posted[76] is prohibited.

In an opinion dated October 14, 1935, the Attorney General of Wisconsin upheld the plan under which the Wisconsin State Brewers Association, under contract with its members, required the filing of prices and the posting of a five cents per barrel performance guarantee. He said that the Association plan was "designed to have a stabilizing influence upon the industry without restraining competition."

Through this patchwork price legislation three threads may be traced: (1) an effort to make effective the tied-house legislation prohibiting discrimination among retailers, (2) an effort to stabilize prices primarily for the benefit of the retailer, and (3) an effort to protect the property interest in the brand name. The third thread, which alone has sustained the validity of the statutory right of action against the non-contracting retailer under the fair-trade acts is barely discernible in the price legislation in and its application to the liquor industry. Retailers are the real beneficiaries. Even in those states where there has been no "unfair practice" legislation fixing mark-ups, the fair-trade acts have had this result.[77]

The Chairman of the Federal Trade Commission in an address before the National Wholesale Druggists' Association Convention on October 4, 1937, warned that even under the Miller-Tydings Act "resale price maintenance agreements among competing manufacturers or among competing distributors, are not permissible if the parties are engaged in interstate commerce or their dealings directly affect interstate commerce." Horizontal price agreements between producers or between wholesalers or between retailers are specifically exempted from protection under the usual fair-trade acts yet it has been seen that they are specifically permitted in some of the more drastic legislation relating to liquor. Whether such legislation, if it burdened interstate commerce, would be sustainable even since the Twenty-first Amendment, is debatable.

Since the fair-trade acts permit the fixing of vertical prices, a horizontal agree-

[75] Reg. 81 (Oct. 1, 1939).

[76] Bulletin 19 (Nov. 17, 1936).

[77] That the industry in practice has lost sight of the theory underlying the fair-trade acts; *i.e.*, the protection of the property interest in the brand name, was revealed in the hearings before the Temporary National Economic Committee of Congress in its investigation of concentration of economic power. Mr. W. W. Wachtel, President of Calvert Distillers Corp., which, as a matter of policy, engages extensively in fair-trade contracting, stated (*T. N. E. C. Hearings*, *supra* note 23 at 2565): "It isn't politics, it is a question of misunderstanding of who benefits from fair trade. The retailer benefits, not the distiller. You pull the plug out tomorrow on Calvert and our sales would double, but we don't think it would be good over the long pull because the retailer would go broke." Mr. Wendell Berge, Special Assistant to the Attorney General, asked Mr. Wachtel (at 2563), "In other words, you take into account, or try to take into account, in fixing the price what you deem to be the retailer's welfare. If you think he can exist on one price you fix it there, and if you think that he requires a higher price you fix it there." Mr. Wachtel, "That is right." There was considerable discussion at the hearing as to the tendency under the fair-trade acts towards the fixing of price to the detriment of the consumer. See also Edwards, *Appraisal of "Fair Trade" and "Unfair Practice" Acts*, abstracted in (1940) 30 AM. ECON. REV. No. 1, pt. 2, Supp. 112.

ment, either among producers or among retailers, would freeze the entire price structure and completely eliminate competition in possible violation of many state anti-trust laws and federal laws. There is evidence that this is happening in the liquor industry. The fair-trade acts designed to protect the property interest of the manufacturer in the trade-mark or brand name have turned out to be a blackjack in the hands of retailers. The Federal Trade Commission issued a complaint on January 20, 1940, against the National Retail Liquor Package Stores Association, 29 other retail liquor associations, 83 individuals and, through representatives, all members of the various associations, as a class, alleging that the defendants had agreed and conspired to eliminate price competition among themselves for the purpose of increasing their profits. It is charged that the defendants in order to make effective the conspiracy not only fixed prices among themselves but also "under threat of boycott" sought to compel manufacturers, importers and wholesalers to sell at prices fixed by the defendants by insisting that they enter into fair-trade contracts. It is further alleged that they spied upon retailers, reported price cutters to their vendors and by threat of boycott demanded that they refuse to supply them. It is alleged that by these acts the retailers had created a monopoly and that their acts constitute unfair competition within the meaning of the Federal Trade Commission Act.

A similar condition is revealed in the defense filed in the case of *Julius Weisstein v. Irving Silverman* now pending in the Supreme Court of New York.[78] Silverman, accused of price cutting, alleges in his defense that plaintiff, a retailer, and Chairman of the Distillers Committee of the Greater New York Licensed Liquor Stores Association, Inc., had conspired with other retailers and members of associations doing ninety percent of the package store business in the New York area to fix a 40 percent mark-up for themselves on domestic liquors and a 33⅓ percent mark-up on imported liquors in violation of the state anti-trust laws. It is alleged that they had by boycott forced manufacturers to enter into contracts giving them uniform mark-ups.

The issue raised by the cases is critical. If groups of retailers through horizontal agreements and boycotts can force vendors to give them uniform mark-ups, there is complete freezing of the price structure at levels limited only by the greed of the powerful pressure groups. While some of the state laws specifically permit such horizontal agreements in the alcoholic beverage field and specifically permit boycotts against manufacturers who refuse to furnish the vertical support to complete the rigid price structure, the statutes fix a maximum in the interest of the consumer. If such rigidity is desirable in the interest of preventing price wars, it should be accomplished by legislation adequately protecting the consumer and not by the dictation of pressure groups. The resale price maintenance contract, originally purporting to protect the property interest of the producer in brand names, has proved to be a dangerous weapon in the hands of the retailer.

Out of the experiments in price legislation in the alcoholic beverage industry may come a plan which will serve to further the policy against the tied-house, prevent

[78] N. Y. Times, Aug. 23, 1940, p. 22, col. 4.

discrimination, protect the property right of the manufacturers in their brand names, assure the retailer a reasonable mark-up, prevent destructive price wars and at the same time protect the consumer. The use of contracts which are not really contracts, for purposes foreign to the theory on which they were sustained, in a highly competitive industry, which is fraught with inherited evils and which deals in a socially dangerous commodity offering big profits, does not appear to be the answer.

WAREHOUSE RECEIPTS

The question has frequently arisen as to whether the statutes governing the conduct of manufacturers, importers, and wholesalers are applicable to dealers in warehouse receipts and whether such dealers are subject to the various statutes governing the sale of securities. There is little uniformity in the treatment of the subject.

Warehouse receipts play an important function in the liquor industry, because whiskey must be stored for long periods necessitating large amounts of frozen capital. It has been the practice to borrow on the immature whiskey in the warehouses, issuing warehouse receipts to the creditors. They also serve as the media through which manufacturers and rectifiers deal in bulk whiskey.

Section 6 of the Federal Alcohol Administration Act prohibits the sale of distilled spirits in bulk to wholesalers, retailers, and consumers and provides that warehouse receipts for bulk whiskey must contain provisions limiting the delivery of the spirits covered thereby to qualified persons; namely, distillers, rectifiers, and a few other types of persons.

It was commonly supposed by the uninformed public at the time of Repeal that enormous profits were to be made in the liquor business. The result was that persons wholly unfamiliar with it were an easy prey for unscrupulous individuals who sought to sell warehouse receipts to consumers and to retailers at prices far above their worth. The prices quoted appeared to the uninitiated to be extremely low because they did not cover storage, taxes, bottling, and other incidental expenses which the purchaser must meet before he could obtain physical possession of the spirits covered by the receipt. Small retailers were particularly gullible and in many cases purchased receipts in large quantities at prices which they considered bargain prices only to find when withdrawal time came that they could buy better and more saleable whiskey at much lower prices. Frequently fraudulent representations were made.[79]

Because a great majority of warehouse receipts are sold in interstate commerce and because they are essential to the distilling industry, much confusion would be avoided if they were treated uniformly by the legislative and administrative bodies. Such, however, is not the case. In fourteen states the sale of the receipt is equivalent to the sale of liquor.[80] In ten states they have been held to be securities,[81] while seven states have held that they are not securities.[82] Sales to the public are prohibited in

[79] New York Joint Legislative Committee on Interstate Co-operation and the Council of State Governments, Interstate Conference on Liquor Control, Jan. 1940, Transcript of Proceedings, p. 21.

[80] Ala., Ariz., Calif., Colo., Conn., Iowa, La., Mich., Mo., N. J., N. Y., Pa., Wash., Wis.

[81] Fla., Ind., Ky., La., Minn., Neb., N. D., Ohio, Ore., Wis.

[82] Ariz., Ill., Mass., N. M., Okla., Pa., Wash.

eight states.[83] The sale of warehouse receipts is equivalent to the sale of the whiskey covered thereby for the purpose of federal permits and occupational taxes.

California requires broker licenses except in the case of sales by a manufacturer, rectifier or wholesaler or by a financial institution.[84] In Michigan receipts may be sold only by the distiller of the whiskey covered thereby or his agent.[85] Their sale has been held to be illegal in Oregon as the receipt represents the whiskey and the state has the exclusive right to sell.[86] In a number of states licenses are required by the securities commissions.

A proposed uniform statute was adopted by the Interstate Conference on Liquor Control called by the New York Joint Legislative Committee on Interstate Co-operation and the Council of State Governments held in Buffalo in January, 1940. It provides:

> "No licensee shall sell or purchase any receipts, certificates, contracts or other documents issued for the storage of alcoholic beverages except as provided by the rules of the liquor authority. The liquor authority shall prescribe such rules for the purchase and sale of such receipts, certificates, contracts or other documents issued for the storage of alcoholic beverages which, in its opinion, will best accomplish
>
> (1) Elimination of fraudulent and deceptive transactions;
> (2) Protection of purchasers against defaults by sellers;
> (3) The delivery of the alcoholic beverages represented by such receipts or documents, and
> (4) The payment of all taxes due thereon to the state.
>
> This act shall take effect immediately."

Uniformity will probably be difficult to obtain because the subject traverses two fields of established law, liquor legislation and securities legislation, and because warehouse receipts have been the subject of diversified treatment over a period of years.

[83] Ala., Conn., Mass., Mich., N. C., Okla., Ore., Wis.

[84] Laws 1935, c. 330, §6(k).

[85] Reg., May 4, 1937.

[86] Opinion, Dec. 10, 1934, BIEN. REP. ATT'Y GEN. (1934-1936) 165.

SELF-REGULATION IN THE BREWING INDUSTRY

CARL W. BADENHAUSEN*

The American brewing industry as it exists today is a billion-dollar business less than eight years of age, recreated overnight by popular demand after thirteen years of Prohibition, governed by 50 different sets of laws and regulations and confronted by myriad problems dealing with its present and future.[1] In any consideration of modern American brewing's part in the social and economic world today, it is essential that the effects of the years of Prohibition be assigned an important role. Beer was relegalized as a restoration of individual liberty and a source of revenue, to be sure. But when the Congress relegalized light beer on April 7, 1933, and the necessary 36 states acted to repeal the Eighteenth Amendment eight months later, the thought uppermost in the minds of most Americans was that the abuses and disrespect for law which accompanied Prohibition would vanish once beer and liquor were sold as valid articles of trade.[2]

The responsibility for drawing the laws regulating beer and brewing fell to the state legislatures, and the thoughts that have been mentioned dominated the philosophy of the state laws as they were enacted. By and large, an excellent job was done—considering that no adequate changeover from Prohibition to legalization had been worked out, that haste was apparently of the essence, and that the public had had no transition period in which to divest itself of peculiar habits acquired during the life of the Eighteenth Amendment.

Legality, in other words, was deemed sufficient protection for the industry and the public as well. The fact that light beer was permitted to be sold for eight months before the Twenty-first Amendment became effective may have seemed at the time to provide a sufficient time of transition; there was no provision, however, to deal with the psychological reactions of a nation to which, for the first time in thirteen years, certain personal liberties which had never been abandoned had been officially restored.

The states, the District of Columbia, and the territory of Alaska—considering only the continental United States—established alcoholic beverage control boards, liquor control boards, revenue department supervisors, liquor licensing departments, beverage divisions of tax departments, and other state agencies. These agencies or boards

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[1] See PERSONS, BEER AND BREWING IN AMERICA (Revised ed. 1940).

[2] See President's Repeal Proclamation, 48 STAT. 1720 (1933).

were empowered to issue brewing, wholesaling and retailing licenses—in some cases, even purchaser-permits—and to revoke these licenses if their privileges were abused.[3]

In virtually every state, stringent restrictions barred the brewer from having financial interest in or furnishing equipment to retail places. The same restrictions, generally, were placed on the wholesaler. Laws prohibited credit among brewer, wholesaler, retailer and consumer. The theory behind these restrictions was that the brewer, by means of the so-called controlled outlet or tied-house, had been responsible for the old-time saloon. Although disagreeing with this theory, the brewing industry as a whole approved of the philosophy of the legislators—that the saloon and its social implications should not again be permitted to become a part of American life.

The reborn brewing industry accepted willingly the restrictions placed around it, albeit with human misgivings about some of the bans which denied to it certain trade practices which were permitted and considered logical for other industries such as dairying and meat packing.

Beer and ale were brewed legally and distributed as the various laws directed. Distributors or wholesalers obtained their licenses and looked for retailers. Restaurateurs, grocers and a new crop of tavern licensees purchased beer and dispensed it to the public. The business grew, not to the point at which it stood in 1914, to be sure, but to the point, at least, at which its total taxes alone amounted to more than a million dollars a day.[4] With beer being legally manufactured in 40 states and drawing on 100 industries in all the states for equipment and supplies, brewing generated an economic upswing which resulted in the creation or maintenance of a million jobs, and in local and national business benefits which have been estimated at eleven billion dollars in seven years.[5]

After three years of conducting its business affairs as other American industries conduct theirs, the brewing industry began to hear complaints that all was not as it was meant to be. Word filtered through that the public, here and there, had become so dissatisfied with actual conditions in retailing places that some areas had again voted for local prohibition where this was provided under the law. Realizing that the public, after all, was the final court of appeal for the continuation of its privileges, the brewing industry at once set about determining just why the public was displeased or was likely to be dissatisfied with the operation of the industry it had worked so strenuously to relegalize. Here the industry sought the answer not only among the public, but in the various state laws and regulations.

In almost half the states, Sunday sales were specifically prohibited by either law or regulation. A large majority of the state laws specifically prohibited the serving of minors or intoxicated persons, and the employment of minors. Other states took the same attitude through regulations. Laws and regulations by the control boards in many cases also forbade employment of women, solicitation, treating, disorder, gambling, obscurity, employment of felons, the serving of persons receiving charity,

[3] See CULVER AND THOMAS, STATE LIQUOR CONTROL ADMINISTRATION, A STATUTORY ANALYSIS (1940).

[4] PERSONS, *op. cit. supra* note 1, at 24.

[5] Industry Statistics, United Brewers Industrial Foundation, Oct. 1, 1940.

the construction of booths, the serving of women at bars, music and dancing.[6] It appeared that these were the evils, not beer itself, which the state legislatures and the public wished to guard against, and that violations of these provisions were causing public complaint—not against them but against beer. It is also important to note that these violations were taking place not in breweries or in wholesaling establishments, but in licensed retail establishments. The brewer had been completely removed from responsibility or authority by the restrictions illegalizing any brewer-control of retail outlets.

Thus it became apparent at once that the burdens which prior to Prohibition had been the province of the brewer had become under the new legislation the burdens of the individual retailer. He, alone, was given the responsibility of operating a wholesome place. Thus the individual retailer's task was made the most delicate in the industry; without industry aid, he had been made solely responsible for the future of a billion-dollar business. A few states, to be sure, have laws or regulations providing penalties upon the consumer should he be the cause of disturbances in taverns. However, it is the rule that a licensed retailer is the sole responsible party for the conduct of and in his place of business.

Two tremendously important problems confronted the brewers of America. First, the public had carried its Prohibition habits over into the new era, and, second, there had sprung up among the licensed retailers some "black sheep" proprietors whose weakness or unscrupulous law violations brought unwarranted condemnation upon the majority of reputable licensees. Admitting that these problems created clouds over the future of legal beer, the brewing industry undertook the giant task of dealing in some way with both of them. Brewing trade associations instituted studies to determine what could be done, and of these studies was born the United Brewers Industrial Foundation and its plan of industry self-regulation.[7]

Self-regulation, which has come to be the basic and permanent policy of the brewing industry as its contribution to law and order, was first attempted as an experiment in Nebraska, in June, 1938. Conditions in Nebraska were near average—probably a little better on the whole, than in some parts of the country. But because Nebraska had come to be the proving-ground of so many successful experiments, the industry thought the choice sound and logical. Nebraska's laws regulating the manufacture, sale and use of beer were and are typical of the laws in other states, differing only slightly wherever such differences exist. A Liquor Control Commission has authority to issue licenses and to revoke them. Nebraska is the home of five breweries, and provides territory for distribution of some beers manufactured outside the state. Under these circumstances, the experiment was begun.

With the cooperation of out-of-state brewers doing business in Nebraska and sponsored by the Nebraska industry itself, on June 5, 1938, a meeting was held in Omaha to which all the interested brewers and all the distributors in the state were

[6] See CULVER AND THOMAS, *op. cit. supra* note 3.

[7] See UNITED BREWERS INDUSTRIAL FOUNDATION, AN ANCIENT BEVERAGE AND A MODERN INDUSTRY (1939).

invited. Ninety-five percent participation resulted. Thus was the Nebraska Brewers and Beer Distributors Committee established, to become the prototype for thirteen similar state committees. At the meeting, an executive committee of brewers and distributors was selected by the entire membership. To administer the work of the Committee, the membership selected as State Director Mr. Charles E. Sandall, a former United States Attorney who had been in office during Prohibition. A former member of Nebraska's Supreme Court Commission, Mr. Sandall was known throughout the state as a man of character and energy. He accepted his new task only after he was convinced that the industry was sincere in what it planned to do.[8]

Briefly, the Nebraska Brewers and Beer Distributors Committee's plan was this: to withhold supplies of beer from retail licensees who failed to observe their responsibilities under the law, and to seek the revocation of the licenses of those retailers who persisted in flagrant violations, either committed or countenanced. In refusing to furnish beer to retailers who failed in their responsibilities, the Committee took the attitude that although removal of beer probably would not improve the moral tone of these places, the industry would forego profits rather than allow its products to be dispensed in unsavory surroundings. The mechanics of the program were simple. The state was mapped into 17 districts, and in each district all distributors became members of a district committee. The special function of these committees was to assist Mr. Sandall in observing conditions in their territory, bettering them by persuasion where possible, and refraining from interfering in drastic action if the State Director considered this necessary.

Here, again, it must be emphasized that the brewers and distributors had no legal responsibility for the conduct of beer outlets, and no authority save that of industry perservation and the public welfare. They had the right and responsibility, however, of every good citizen: to aid and support the properly constituted authorities. In this case, the industry's cooperation was offered to and accepted by the Nebraska Liquor Control Commission, and by local authorities as well. Retail licensees were advised of the Nebraska Committee's formation. Those who refused to cooperate with the public and the Liquor Control Commission by cleaning up the violations of law which were noted on their premises soon learned that the Nebraska Committee's program was no hollow promise.

When two agents of the Liquor Control Commission were assaulted in a tavern, Mr. Sandall at once informed committee members. They withheld supplies of beer from the proprietor. His license was revoked by the Commission.[9] This action by the Commission undoubtedly would have been taken with or without any concurrent activity by the brewing industry; nevertheless, it was a test which demonstrated the industry's sincerity and the workability of the program. The vigilant Nebraska press cited the incident as foreshadowing "the dawn of a new day in the beer branch of the liquor trade."[10]

[8] See public statement of Charles E. Sandall (June 5, 1938).
[9] Nebraska Liquor Control Commission, Proceedings against Vernon Staskiewicz (June 1938).
[10] See Omaha World-Herald, June 17, 1938, "A New Day" (editorial).

Thus encouraged, Mr. Sandall directed investigation of retail outlets called to his attention, either by members of the industry or the public. Corrections were tried, with gratifying results. The great majority of retailers, it was found, were anxious to cooperate with the Liquor Control Commission and the Nebraska Committee, once they fully realized that in the beer retailing business the law and public sentiment are always right and the customer all too frequently wrong.

Another test was presented when a retailer who had failed to heed the Committee's warnings sued for damages after he found that distributors were unwilling to sell him beer. He charged restraint of trade, naming State Director Sandall and those distributors who refused to supply him with beer. When the case finally reached trial, the jury was informed of what the Nebraska brewing industry was trying to accomplish. The verdict was returned in favor of the Committee,[11] thus establishing the first court precedent in the industry's campaign for high retailing standards.

The public in Nebraska soon became aware of the activities of the Nebraska Brewers and Beer Distributors Committee, and, like the Liquor Control Commission, welcomed the industry's shoulder at the law-enforcement wheel. The public likewise began to respond to the industry's reminder that the public had a responsibility—that of patronizing only those licensed beer establishments which observed the law. Retailers, quick to sense that they were the ultimate beneficiaries of the Committee's work, undertook to get their houses in order.

At the end of the first full year of the Committee's work in Nebraska, Mr. Sandall received from the Chairman of the Liquor Control Commission a letter stating: "We would be negligent, indeed, if we failed to express to you our appreciation of the work your organization has done. . . . We welcome wholeheartedly such help. . . ."

After scanning the Nebraska operation for six months, the industry at large acknowledged that self-regulation had the merit of dealing at once with two of the problems besetting legalized beer—the "black sheep" dispenser and the consumer who aided, abetted and frequently instigated law violations. As a consequence, self-regulation was adopted by the United Brewers Industrial Foundation, an educational, non-profit-making organization having as its members not only brewers but also allied manufacturing industries.

Beginning in 1939, the idea of self-regulation as applied in Nebraska was explained to the industry in other states. Simultaneously the states were studied to determine where the program could aid the authorities and the industry in dealing with their problems. As the program was gradually extended to other states, attorneys-general strengthened it when, in response to requests by state officials, they ruled that it is legally permissible in the public welfare for members of the industry to cease selling beer to known law violators.[12]

[11] Anderson v. Anstine *et al.* (Dist. Ct. Buffalo Co., Neb., Apr. 18, 1939).

[12] From correspondence and records of attorneys-general of the following states: Ala. (Mar. 1939), Okla. (Sept. 1939), Miss. (Oct. 1939), W. Va. (Nov. 1939), Tenn. (Feb. 1940), Ga. (Feb. 1940), Ark. (Mar. 1940), Ky. (May 1940).

The states in which the industry now has adopted self-regulation are Nebraska, Kansas, Missouri, Oklahoma, Arizona, Arkansas, Maine, West Virginia, Kentucky, Tennessee, North Carolina, Georgia, Alabama and Mississippi. As an appreciation of the meaning of self-regulation grows, and the industry's facilities permit, this number will be increased.

A few of the activities of the 14 state self-regulatory committees in pursuance of the greater respect for law and order enjoined by President Roosevelt in proclaiming repeal of the Eighteenth Amendment will serve to give point to this explanation of the brewing industry's cooperation with the authorities.

In Mississippi, where beer is the only legal alcoholic beverage, a college student was killed in a "honky-tonk" in Lowndes County, bordering Alabama in the northern section of the state. Petitions were immediately circulated for the outlawing of beer, the inference being that legal sale of beer had been at the root of the slaying. Evidence collected by the Brewers and Mississippi Beer Distributors Committee had previously brought about revocation of the licenses of two such places in the county, but the distributors agreed that they had better take more far-reaching action. They immediately stopped selling beer to nine places, including the one in which the shooting had occurred. Local officials followed with raids and padlock orders. Six of the "spots" with evidence of law violation were put out of business. Conditions became better than normal, and newspapers emphasized that beer was not to blame, pointing out the effects of the Committee's work. No action was taken on the local prohibition petitions.

In Huntsville, Alabama, a prominent and influential citizen interceded for a retailer whose license the Committee sought to have the Alcoholic Beverage Control Board revoke. When the State Director of the Committee produced his case in private, the citizen withdrew his support of the retailer, explaining he had not known that "conditions were that bad." The license was revoked.

In Tennessee, where there is no central authority for the regulation of beer licensees, fewer than half of the state's 95 counties had set up the legally required machinery for county regulation when the industry's Committee was organized. The State Director, an able attorney and former floor leader in the State Senate, aided in the drafting of a model license application which has since been adopted in whole or in part by 52 counties.

Beer of 3.2% alcoholic content is the only legalized alcoholic beverage in Kansas. In that state, it is illegal for licensed beer retailers to possess the $25 Federal tax stamp issued to those handling beer, wine and liquor; the $20 Federal beer tax receipt alone is legal. Foreseeing the obvious intent of several hundred retailers who had obtained the $25 receipt, the Kansas Committee's State Director promptly informed responsible Kansas enforcement authorities of the names of the holders of the illegal stamps and urged that action be taken against them. Likewise, authorities in North Carolina have been asked by the Brewers and North Carolina Beer Distributors Committee to scrutinize carefully all applications for beer licenses to guard against evasion of

the provision in the law barring an individual guilty of any liquor law violation in the previous two years from obtaining a retail beer license.

A brief summary of the results of self-regulation is in order. Bearing in mind that the state committees have been formed one after another, rather than simultaneously, the work has been slow in accumulating figures which the sensationally-minded would consider impressive. Nevertheless, state committees have conducted 18,002 investigations which have resulted not only in 2,158 warnings to retailers to correct certain conditions, but also in 23 probations, 38 license suspensions, 71 injunctions, 125 prosecutions of bootleggers, and 459 license revocations by enforcement authorities. In addition, it has been established that in 921 rechecked cases, warnings have brought corrective action by cooperative retailers.[13]

The Foundation does not establish a state committee as a temporary measure. Once a state committee is brought into being, it remains an integral part of the brewing industry in that state, always available for cooperation with the public and the authorities. From this explanation of the why and how of self-regulation in the brewing industry members of the general public may obtain a view of how one extensive industry is conducting its effort to abide by the many statutes which have been set up to regulate it.

Another important phase of self-regulation also will be remarked: the utter absence of political or legislative activity by state committees, and refusal to become involved in trade practices or disputes. Such activity is forbidden by Foundation policy, in keeping with the spirit of the Repeal Proclamation in which the national policy was stated[14] to be that "the social and political evils that have existed . . . shall not be revived nor permitted again to exist." In conclusion, it should be observed that through self-regulation, the brewing industry hopes to do its part to guard against the return of the bootlegger menace and to eliminate "such others as would profit at the expense of good government, law and order." This, brewers feel, is a debt to the nation; a debt that can be paid by vigilance and action.

[13] Self-Regulation Statistics, United Brewers Industrial Foundation, October 5, 1940.
[14] 48 STAT. 1721 (1933).

PROTECTION OF DRY AREAS

Jack E. Thomas* and Dorothy C. Culver†

So much public attention has been given the legalization of alcoholic beverages in the United States many persons fail to realize that one sixth of the nation still lives in territory which is legally "dry" and that only 15 states are entirely "wet."[1] More than academic interest attaches, therefore, to the problems involved in the protection of dry areas in the other 33 states.

Enforcement of sumptuary legislation has long been recognized as one of the most difficult tasks of government, so it was scarcely to be expected that the states could create a complete solution to the problems involved in regulating the sale and consumption of intoxicating beverages immediately following adoption of the Twenty-first Amendment. Not the least among the legal and administrative difficulties which arose were those involving dry areas. In many instances the problems which had marked the national prohibition period were intensified by the fact that large supplies of legal liquor became available within a few miles of most dry sections of the country. Consideration of the efforts made to protect dry localities demands recognition that there are two distinct types of such areas—the prohibition states of Kansas, Mississippi and Oklahoma, and the thousands of cities, towns, counties, and precincts which are dry by local option.[2]

Kansas, Oklahoma, and Mississippi, with an aggregate population of six and a quarter million persons and an area of nearly 200,000 square miles, are veritable islands in a sea of liquor.[3] Despite their common boundary, Kansas is still bordered

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[1] States without dry territory within their borders include Arizona, California, Delaware, Idaho, Indiana, Iowa, Louisiana, Michigan, Missouri, Montana, Nevada, South Carolina, North Dakota, Utah, and Wyoming.

[2] Legality of local option elections has been upheld on the ground that delegation by the legislature of the power to determine certain facts upon which the action of the law depends, as in local option, is not a delegation of the power to legislate. Johnston v. Bramlett, 193 Ark. 71, 97 S. W. (2d) 631 (1936).

[3] N. Y. Times, Nov. 5, 1936, p. 14, col. 5. Oklahama in 1936 defeated repeal of state prohibition by a 3-1 vote. Division of wet-dry sentiment in Kansas and Mississippi is more difficult to determine. None of the three states participated in the vote on ratification of the 21st Amendment, but their congressmen were overwhelmingly against the repeal resolution.

The *Literary Digest's* Prohibition Poll in 1932, although accused of exaggerating wet sentiment, still

by three wet states and Oklahoma by five. Four wet states line the borders of Mississippi. What these dry states are doing to protect themselves, the parts played by neighboring states, and the role of the Federal Government as a protector of dry sentiment are deserving of consideration.

A population double that of the three dry states is contained in localized dry areas scattered through 30 states. The device of local option, which played such a prominent role in the rise of the prohibition movement prior to 1919, was written into the liquor control statutes of 35 states as a compromise with dry sentiment.[4] Such a compromise apparently was quite necessary in some states, for more than half of the population of Georgia, North Carolina, Tennessee, and Texas lives in areas which are dry by local option, and more than 25 percent of the residents of Alabama, Kentucky, Maine, and Vermont also live in prohibition territory.[5] Sentiment against traffic in intoxicating beverages appears to be concentrated largely in the South, and is weakest in the far West. As was the case before national prohibition, local option elections indicate that prohibition sentiment is stronger in rural than urban areas, and in small cities rather than large ones.[6]

Prohibitionists are admittedly hopeful that local option provisions can be utilized to promote the repeal of the Twenty-first Amendment, but thus far tendencies in this direction have been quite mixed. On the one hand, at least one state transferred from the dry to the wet column each year between 1933 and 1939, but, on the other, drys appear to be winning more local option elections than the wets.[7] Local dry

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showed a vote for national prohibition of 50.2% in Kansas, 45.4% in Oklahoma, and 44% in Mississippi. In only four other states did the dry vote exceed 40% of the total. 113 LIT. DIG. 11 (June 25, 1932).

[4] No localities have voted dry under the local option laws of Delaware, Louisiana, Michigan, Missouri, and Montana, according to latest available reports.

[5] DISTILLED SPIRITS INSTITUTE, THE LOCAL OPTION FALLACY (1938) 16. Tennessee did not adopt its liquor control statute until 1939, but by May 18, 1940, only 13 counties, containing one third of the state's population, had voted to legalize the sale of intoxicating beverages.

[6] ALA. ALCOHOLIC BEV. CONTROL BD. ANN. REP. (1937), 7. In Alabama, for instance, the 25 counties which had voted to legalize liquor represented 39.3% of the counties of the state, but included 51% of Alabama's population.

KY. DEP'T. REV., ALCOHOLIC BEVERAGE STATISTICS (1938) 4. As of Dec. 31, 1938, Kentucky's 41 dry counties included 34.2% of the counties, but their combined population was only 24% of the total for the state.

[7] DISTILLED SPIRITS INSTITUTE, ANN. REP. (1939) 11, 71. A compilation of 5,140 local option elections resulting in a change of status between Repeal and December 31, 1939, indicated prohibitionists had won in 2,898 elections, while the forces of Repeal had been successful on 2,242 occasions. More than 2,800 of these elections were held in Pennsylvania, Illinois, Ohio, and Maine, the dries winning in 1,826 tests and the wets in 1,025. Of 1,136 local option elections held in 22 states in 1939, 770 resulted in no change of status, 301 wet communities voted to become dry, and 65 dry areas were added to the wet column.

5 PROCEEDINGS, NAT. CONF. STATE LIQUOR ADM'RS (1938) 11. Data obtained from 41 states indicated that dry territory had increased since Repeal in 14 states, decreased in 9, and shown no change in 18.

N. Y. Times, Jan. 21, 1940, p. 14, col. 1. Official balloting in 1933-34 indicated 70% of the voters were wet, but the American Institute of Public Opinion (Gallup Poll) tests on the question whether Americans would vote dry if national prohibition came up again have revealed the following division:

	Percentage dry	*Percentage wet*
December, 1936	33	67
February, 1938	34	66
December, 1938	36	64
January, 1940	34	66

sentiment, however, has shown nowhere near the strength that it demonstrated in the last few years prior to adoption of the Eighteenth Amendment—the state of New York, for instance, having only 50 dry towns at the close of 1939, as against 602 towns and 18 cities in the prohibition column in December, 1918.[8]

The facts that most of the areas which are dry under local option are, individually, small in territory, that they are reasonably divided in wet-dry sentiment, and that they are almost always located within a few miles of localities in which liquor can be sold legally, form the basis for perplexing problems of administration and enforcement in these days of frequent intercommunication and widespread use of automobiles. It should not be forgotten that at the time the Eighteenth Amendment was submitted to the people it was argued that the minority of wet states was able to nullify state prohibition by shipping liquor into the dry areas.[9] How potentially greater is such a danger now that the dry states are outnumbered 15 to one by states in which the sale of distilled spirits is legal?

The Twenty-first Amendment clearly recognizes the right of individual states to regulate and even prohibit traffic in intoxicating beverages,[10] and it would appear that those which chose to remain dry might reasonably expect protection against the solicitation of sales, the prohibition of illegal transportation of liquor, freedom from any action which might appear to give a federal cloak of legality to acts illegal under state law, and adequate law enforcement at the state and local level.

Advertising

Publications advertising or soliciting orders for intoxicating liquor were banned from the mails if directed to any place in which it was, by state law, unlawful to advertise or solicit orders for intoxicating liquors, under terms of the Reed "bone-dry" Amendment of 1917.[11] The Twenty-first Amendment did not affect this Reed measure, and during the ratification period there was some confusion among liquor advertisers and publishers. Attorney General Cummings ruled that the responsibility for barring liquor advertisements from the mail moving into dry territory rested primarily on the Postmaster General, asserting that if "alleged violations of the Reed amendment are reported to the Department of Justice by the Postmaster General, the Department will give appropriate attention to such cases."[12] The Post Office Department announced that it would enforce the law forbidding the circulation of

[8] N. Y. Times, Nov. 19, 1939, p. 22, col. 4.

[9] U. S. BUREAU OF PROHIBITION, STATE COOPERATION IN THE ENFORCEMENT OF NATIONAL PROHIBITION LAWS (1930) 2.

[10] Sec. 2 provides: "The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

[11] 39 STAT. 1069 (1917) amending Webb-Kenyon Act, 37 STAT. 699 (1913).

[12] Ruling of October 26, 1933. The Attorney General had previously stated that "some of the newspaper people have rather overstepped the limit" in printing liquor advertisements, especially those soliciting immediate orders, but he added that neither the publishers nor the advertisers had anything to fear if there was no intent to violate the law. N. Y. Times, Oct. 20, 1933, p. 10, col. 2; Oct. 27, 1933, p. 9, col. 3.

liquor advertisements in dry states, although it had not done so pending the decision of the Department of Justice.[13]

As a precautionary measure some liquor advertisements carried a "when and if" clause—publications being accepted for mailing which contained liquor ads specifically stating that beverages would be delivered only "when and if" Repeal was adopted.[14] The Post Office Department overlooked its regulation that every edition of any publication must be exactly the same in form and content,[15] and publishers were allowed to mail editions bearing liquor advertisements to wet states and the same edition with the advertisements removed and the pages left blank or filled with other copy to dry states![16] *Time,* beginning January 15, 1934, and for several months, carried liquor advertisements which included the statement: "This advertisement is not intended to offer alcoholic beverages for sale or delivery in any state wherein the sale or use thereof is unlawful."

The Liquor Enforcement Act of 1936[17] repealed the Reed amendment, thus returning to the states that much more of the problem of liquor control. Most of the states which had set up liquor systems had included provisions concerning advertising by various media: publication, billboard, and radio, to meet this situation. The dry states—Mississippi and Oklahoma—prohibit advertising and solicitation of orders by publication.[18]

Radio advertising of distilled spirits has been used very little.[19] The states are practically without power to deal effectively with such advertising,[20] and the federal law does not provide much regulation. The Federal Radio Commission, however, called the attention of broadcasters and advertisers to the fact that the "Radio Act of 1927 provides that stations are licensed only when their operation will serve public interest, convenience and necessity," and asked their intelligent cooperation insofar as liquor advertising is concerned.[21]

Repeated recommendations of the Federal Alcohol Administration and petitions of citizens to Congress finally resulted in the introduction of a bill to amend the Communications Act of 1934 by prohibiting the advertising of alcoholic beverages over the radio.[22] The Senate Committee on Interstate Commerce submitted a majority report[23] which pointed out that the spirit and purpose of the Twenty-first Amend-

[13] N. Y. Times, Oct. 30, 1933, p. 19, col. 6. A list of the states affected by the Reed amendment is carried in Post Office Dep't, Liquor Bulletin No. 3, Dec. 1, 1933, p. 1.

[14] Howe, *Liquor Can Be Advertised Now,* 165 PRINTERS' INK 17-20 (October 12, 1933).

[15] N. Y. Times, Dec. 6, 1933, p. 22, col. 5.

[16] Vane and Hubbard, *Liquor—the Problem Child,* 22 ADVERTISING AND SELLING 19-20 (Nov. 23, 1933).

[17] 49 STAT. 1930 (1936), 27 U. S. C. §§221 *et seq.* (Supp. V, 1939).

[18] MISS. CODE (1930) c. 38, §2025; OKLA. STAT. (1931) c. 16, §2618.

[19] 166 PRINTERS' INK 12 (Feb. 8, 1934). Station WOR at Newark, N. J., on a program advertising a gin, made the preliminary statement: "Those listening in from dry states may now tune out this station, for the next program is not intended to offer alcoholic beverages for sale or delivery in any state or community wherein the advertising, sale or use thereof is unlawful."

[20] North Carolina prohibits the advertising of liquor on radio programs originating in the state.

[21] N. Y. Times, Feb. 3, 1934, p. 1, col. 6.

[22] S. 517, 76th Cong., 1st Sess. (1939).

[23] SEN. REP. No. 338, 76th Cong., 1st Sess. (1939).

ment was to restore to the states the primary power of policing the liquor traffic as they saw fit, and that it was contrary to the purpose of the Amendment that Congress should permit the federally controlled medium of the radio—for which it was directly responsible—to be utilized for an advertising campaign to promote the sale of liquor.

Transportation

As early as 1890, the Federal Government provided by the Wilson "original package" Act that all intoxicating liquors transported into any state became subject to the laws of that state upon arrival.[24] Previously the courts had held that a state could not forbid any common carrier from bringing intoxicating liquors into the state,[25] and that any importer had the right to sell in the original package, notwithstanding a state law to the contrary.[26] The Webb-Kenyon Act[27] in 1913 further divested liquor of an interstate character and enlarged the scope of the Wilson Act by making receipt and possession of intoxicating liquor as illegal as its transportation into a dry state.[28]

Prior to adoption of the Eighteenth Amendment and the National Prohibition Act,[29] the President was given "war" powers to prohibit alcoholic beverages in or near military camps,[30] to establish such dry zones as he deemed advisable about coal mines, munition factories and shipbuilding plants,[31] and to prescribe limitations on the use of food and fruit materials in the production of malt and vinous liquors, without, however, authorizing the licensing of the manufacture of liquors in any state or civil subdivision where such was prohibited.[32]

In the consideration of this aspect of the problem greatest immediate importance attaches, of course, to the ratification of the Twenty-first Amendment on December 5, 1933, carrying as it did in Section 2 its prohibition of the transportation or importation of intoxicating liquors into any state for delivery or use therein in violation of the laws of the state.

The Liquor Taxing Act of 1934[33] provided, among other things, that whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for sacramental, scientific, medicinal, or mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating beverages, shall be fined or imprisoned or both. The Liquor Law Repeal and Enforcement Act of 1935,[34] while repealing Titles I and II of the National Prohibition Act and all laws amendatory or supplementary to the act, restated in Section 202(b)

[24] 26 STAT. 313 (1890), 27 U. S. C. §121 (1934).

[25] Bowman v. Chicago & N. W. Ry., 125 U. S. 465 (1888).

[26] Leisy v. Hardin, 135 U. S. 100 (1890).

[27] 37 STAT. 699 (1913), 27 U. S. C. §122 (1934).

[28] Adams Exp. Co. v. Commonwealth, 160 Ky. 66, 169 S. W. 603 (1914), held that Webb-Kenyon Act did not apply to liquor shipped for personal use of consignee where such shipments are not prohibited by state law.

[29] 41 STAT. 305 (1919).

[30] 40 STAT. 82 (1917).

[31] 40 STAT. 958 (1918).

[32] 40 STAT. 282 (1917).

[33] 48 STAT. 313 (1934), amending 39 STAT. 1069 (1917) as amended.

[34] 49 STAT. 872 (1935), 27 U. S. C. §§151 *et seq.* (Supp. V, 1939).

the prohibition against transporting liquors into a state in violation of the laws of such state.[35]

Also enacted in 1935 was the Federal Alcoholic Administration Act.[36] In order to regulate intoxicating beverages, protect revenue, and enforce postals laws,[37] Section 3 of this measure provided it would be unlawful to engage in the sale or shipping of intoxicating liquors except pursuant to a basic permit issued by the F. A. A. Certain character qualifications are required of permittees (§4(a).2) and the basic permit is conditioned upon compliance with the Twenty-first Amendment and laws relating to its enforcement (§4(d)).

A further effort to control liquor transportation was embodied in the Liquor Enforcement Act of 1936[38] which provided a misdemeanor penalty for anyone transporting intoxicating liquors of more than 4 percent alcohol by volume (excepting for sacramental, scientific, mechanical, or medicinal uses) into a state in violation of its laws. The definition of intoxicating liquors contained in the laws of such state was to be applied.

The difficulty is, however, that "the producer or distributor who holds a Federal permit is precluded from transporting liquor across state lines for unlawful uses, but there is no federal law which prevents him from dealing with bootleggers from outside the state who come to his place of business, pay him cash for his merchandise, and carry it across state lines. This is so, even though the distributor may be fully aware of the intention of the purchaser to introduce the liquor into a particular state for unlawful distribution."[39] Rectifiers and wholesalers are required to keep records of sales[40] but falsification of these records makes it even more difficult to stem the illegal traffic. The Federal Alcohol Administration[41] reports that eight wet-state wholesalers sold approximately a million gallons of distilled spirits to Mississippi bootleggers from January to November, 1939.

Most of the states encourage exportation of liquor by making it tax-free, and thereby may be said to contribute to the bootlegger problem. A lack of regulations concerning out-of-state buyers is conducive to buying in one state for resale in another, particularly when liquors are exported free.[42] Transhipment of liquor in

35 49 STAT. 877 (1935), 27 U. S. C. §122 (Supp. V, 1939).

36 49 STAT. 977 (1935), 27 U. S. C. §§201 *et seq.* (Supp. V, 1939).

37 35 STAT. 1131 (1909), 18 U. S. C. §340 (1934), had made intoxicating liquors nonmailable.

38 49 STAT. 1928 (1936), 27 U. S. C. §§221 *et seq.* (Supp. V, 1939).

39 F. A. A. ADMR., ANN. REP. (1938-1939), 22.

40 19 STAT. 248 (1877), 20 STAT. 329 (1879), 26 U. S. C. §1208 (1934).

41 *Supra* note 39, at 33.

42 DISTILLED SPIRITS INSTITUTE, STATE LIQUOR CONTROL LAWS AND REGULATIONS RELATING TO DISTILLED SPIRITS (1939). Of 45 wet states, 19 specify exports as tax free, 9 list no tax, 11 make no provision concerning exports. Florida provides for an inspection fee of one half cent per half pint, Louisiana levies an inspection fee of 30 cents per case, and the Texas inspection fee amounts to 25 cents per package. Georgia charges a fee of 15 cents per gallon or 45 cents per case and a warehouse charge of 10 cents per case. Missouri allows exports to be tax free if shipped via common carrier and in Pennsylvania exemption is granted shipper upon petition showing that no tax is payable upon spirits shipped from any state which is in substantial competition with Pennsylvania.

Kansas is via established ports of entry and exit;[43] interstate shipment of liquor into Oklahoma and Mississippi is unlawful.[44]

The only way to prevent importation, though, is to apprehend liquor runners in the act, which involves guarding several hundred miles of border in each of the dry states. In Kansas, for instance, most of the roads leading from Nebraska are extremely dusty and bootleggers operating under cover of both darkness and dust and using several different license plates have created a difficult enforcement problem.[45] Almost three years elapsed between adoption by Congress of the Liquor Enforcement Act of 1936[46] and the passage of legislation in Kansas and Oklahoma meeting the requirements of the federal law. Since the 1939 Kansas legislature adopted an act prohibiting the importation of intoxicating liquor except by special permit covering medicinal, mechanical, and similar purposes[47] approximately 50 cases have been filed in federal district courts and guilty pleas obtained in each instance.[48] The volume of illegal liquor still obtainable in dry states, however, indicates that liquor running still continues.

Occupational Tax

Considerable misunderstanding has arisen as a result of the federal occupation tax on liquor rectifiers, wholesalers, and retailers, the charge being frequently made that the Federal Government is licensing bootleggers in dry areas. Levied since 1875, this occupational tax, for instance, requires retail dealers in distilled spirits to pay $25 a year.[49] The tax stamps or receipts for the special tax are sold by the Federal Government without investigation of the applicant, and without regard to whether or not the persons are licensed to engage in the liquor traffic by the state within which they engage in business.[50] During the fiscal year 1938-39, 1,228 retail

[43] KANS. GEN. STAT. (1935) art. 21, §2185. Haumschilt v. State, 142 Tenn. 520, 221 S. W. 196 (1920), held that transportation across a state can be forbidden only if use at destination is illegal; Williams v. Commonwealth, 169 Va. 857, 192 S. E. 795 (1937), held that the 21st Amendment does not authorize a state to regulate the shipment of intoxicating liquors transported through the state.

[44] MISS. CODE (1930) c. 38, §2003; OKLA. STAT. (Harlow's Supp. 1936) §2618. Under Webb-Kenyon Act, states may prohibit such shipments: Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311 (1917); similar holding in M. K. & T. Ry, v. Danciger, 248 F. 36 (C. C. A. 8th, 1918); however, the individual is not prevented from bringing liquors lawfully purchased in another state for his own use, provided such liquors are brought in personally by the purchaser: Crossland v. State, 74 Okla. 58, 176 P. 944 (1918); and Baldridge v. State, 80 Okla. 85, 194 P. 217 (1920).

[45] Kansas Legislative Council, Research Dep't, Memorandum on Liquor Enforcement, Aug. 7, 1940.

[46] *Supra* note 38.

[47] GEN. STAT. (1939 Supp.) c. 21, art. 21.

[48] *Supra* note 45.

[49] 18 STAT. 311 (1875) as amended by 20 STAT. 333 (1879), 48 STAT. 967 (1934), INT. REV. CODE §3250(b)(1) (1939).

[50] Also interesting in this regard was the special annual excise of $1,000 levied under 40 STAT. 1128 (1919), 42 STAT. 296 (1921), 43 STAT. 327 (1924), 44 STAT. 95 (1926), on every person engaged in the liquor traffic in any state or in any place therein, in which carrying on such business was prohibited by local or municipal law. Payment of this tax, as in the case of the special $25 tax, was not to be held to exempt any person from any penalty or punishment provided by the laws of the state, nor was it to authorize the commencement or continuance of such business contrary to the laws of such state, or in places prohibited by local or municipal law. Wainer v. U. S., 299 U. S. 92 (1936): the United States does not license the liquor business but merely lays an excise upon the doing of the business, whether lawful or unlawfully conducted. Chapman v. Boynton, 4 F. Supp. 43 (D. Kans. 1933), held that the internal revenue retail liquor license does not permit licensee to violate state laws. Cleveland v. Davis, 9

liquor dealers obtained such receipts in Kansas, 1,426 paid the special tax in Mississippi, and 1,851 in Oklahoma.[51] In Iowa, state-operated liquor stores are the only legal retail liquor establishments, but during 1938-39, 2,049 retail liquor dealers purchased special-tax stamps to engage in the sale of distilled spirits.

In certain of the wet states the possession of a federal tax stamp by a person who does not hold a state license covering the same activity is prima facie evidence of violation of the state law.[52] In dry counties of Florida and Kentucky, possession of a federal liquor tax stamp is prima facie evidence of the violation of the state law.[53]

The attitude of the Federal Government, reflected in decisions of the Treasury Department[54] and opinions of the Supreme Court,[55] is that the statutory provisions with regard to the occupational tax on liquor traffic are applicable in both wet and dry states; that collectors of internal revenue have no discretion in the issuing of the stamps; that the tax imposed is in no sense a license to conduct a business in contravention of local prohibition laws; that the requirement of publishing the lists of special taxpayers to make such information available to local prosecutors and the admissibility of such evidence in the prosecution of local violators are conducive to enforcement of local prohibition laws.[56] The occupational tax stamp is not a license or permit but merely a receipt evidencing the payment of the federal tax on the occupation of selling liquor—a tax which Congress is required by Article I, Sec. 8, Clause 1 of the United States Constitution to make uniform throughout the Union if it is to be levied at all.[57]

Local Enforcement

Despite all that the Federal Government can do, of course, the on-the-ground protection of dry areas must come from state and local enforcement officers. That each state has a right to establish its own system of liquor control, without regard to the action of other states, has been recognized by the United States Supreme

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F. Supp. 337 (S. D. Ala. 1934), held that where the retail liquor dealer in a dry state had paid his license tax, imposition of the special $1,000 excise would be a penalty which equity would enjoin. U. S. Treas. Reg. 3911, July 30, 1926. The special excise tax was ruled to be a penalty, but this position was reversed on repeal when collectors were instructed to treat the item as a special tax. In U. S. v. Constantine, 296 U. S. 287 (1935) and U. S. v. Kesterson, 296 U. S. 299 (1935), the Supreme Court decided this special excise tax was a penalty. The Revenue Act of 1935, 49 STAT. 1026, provided that it did not apply after June 30, 1935.

[51] U. S. BUR. INT. REV. ANN. REP. (1938-1939), Table 32.

[52] Idaho Laws 1939, c. 222, §909; Tenn. Acts 1939, c. 49, §14 (3); Wis. Stat. 1937, c. 176.05 (3a).

[53] Fla. Laws 1937, c. 18016, §9; Ky. Acts 1934, c. 146, art. 8, §6.

[54] TD-1484 (Bur. Int. Rev.) Apr. 21, 1909, held that special tax stamps are merely receipts for the tax and carry no privileges except immunity from prosecution for nonpayment of the tax; TD-1826, Jan. 7, 1913, held, with reference to the issue of special tax stamps to liquor dealers in prohibition territory, that the Bureau of Internal Revenue was without authority to refuse to issue the special tax stamps in cases where the conditions prescribed by federal laws were satisfied; see also U. S. Bur. of Int. Rev., 12 CUM. BULL. 461-5, 498-99, 500-2 (1933); 13 *id.* 427-33 (1934); 14 *id.* 403-7 (1935).

[55] See cases cited *supra* note 50.

[56] Willingham v. U. S., 208 Fed. 137 (C. C. A. 5th, 1913), "the United States is not concerned with the enforcement of local laws regulating or prohibiting the sale of liquor."

[57] W. S. Alexander, F. A. A. Adm'r, letter of Nov. 22, 1937.

Court.[58] Under the Eighteenth Amendment the state and federal governments could act jointly in enforcing prohibition laws since both had concurrent police jurisdiction. The Twenty-first Amendment, however, extends affirmative federal protection to the states only to a limited extent, and in no event do federal officials have authority over the intrastate sale and distribution of intoxicating beverages.

Federal officials can and do assist state enforcement officers by making available information which to them indicates the possible violation of a state law,[59] but even here the ultimate action depends on state and local authorities. Appraising the effectiveness of enforcement efforts of state and local police is a difficult task, and one quite beyond the scope of this brief discussion, but the frequency of complaints with respect to conditions in specific localities indicates that the problems connected with bootlegging still demand solution.

Interstate Relations

Individual states, in establishing rules and regulations to control liquor traffic, usually considered only intrastate problems, apparently unmindful that serious difficulties might arise if their licensees contributed to violations of the laws of other states with respect to out-of-state sales and transportation across state lines.[60] As late as 1937 the National Conference of State Liquor Administrators' Committee on Cooperation—State and Federal—reported that:[61]

"Other than furnishing each other information, working together along the borders, and, where administrators have authority to promulgate rules and regulations with some force behind them, adopting such rules as would tend to better regulate the traffic between such states, there is not much that can be done toward cooperation between states as each state has its own individual problems and must handle them in their own way. Cooperation between state and federal governments is far more conducive of results than cooperation between states."

Less pessimistic was the stand taken at the second annual Eastern Regional Conference on Liquor Control in New York City, November 18, 1938. It was there resolved that:[62]

"In order to aid states in the enforcement of their laws, the statutes or regulations issued under the statutes of each state should require licensees to respect the laws of adjoining states in order to prevent bootlegging into dry, monopoly or license states. To this end, state laws and regulations controlling out-of-state shipments should prohibit any licensee

[58] State Board of Equalization of Cal. v. Young's Market Co., 299 U. S. 59 (1936); Mahoney v. Jos. Triner Corp., 304 U. S. 401 (1938); Indianapolis Brewing Co. v. Liquor Control Comm. of Mich., 21 F. Supp. 969 (E. D. Mich., 1938); Finch & Co. v. McKittrick, 305 U. S. 256 (1939); Ziffrin, Inc. v. Reeves, 308 U. S. 132 (1939).

[59] W. S. Alexander, F. A. A. Adm'r, on Aug. 15, 1939, furnished Attorney General Parker of Kansas data by letter relative to 146 Kansans who had purchased liquor from Illinois distributors in such quantities as to make it appear they were engaged in retailing distilled spirits. On May 7, 1938, Mr. Alexander furnished Governor Huxman of Kansas a list of Kansans who had been making large purchases from Kentucky distributors, to mention typical instances.

[60] 6 PROCEEDINGS, NAT. CONF. STATE LIQUOR ADM'RS (1939) 28.

[61] 4 *id.* 55.

[62] COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES (1939) 299.

from transporting or importing any intoxicating liquor or from delivering such liquor for the transportation or importation into any state in violation of the laws thereof."

A similar recommendation was included in the Report of the Committee on Liquor Control of the National Conference on Interstate Trade Barriers held in Chicago in April, 1939.[63]

Representative of recent regulations designed to require respect for the laws of adjoining states are those of Indiana concerning non-resident customers.[64] No wholesale licensee may sell spirits to any out-of-state customer unless such customer has the legal right to buy such spirits at the place of his residence in accordance with the laws there prevailing. Nor shall any wholesale licensee sell to any out-of-state customer if such licensee has reason to believe that such customer intends to resell such spirits in any other state in contravention of the laws of that state, regardless of whether or not such customer has the legal right to buy such spirits at his place of residence. An out-of-state customer must exhibit proof of his right to purchase alcoholic beverages according to the laws of his own state and make out an affidavit that such beverages are not to be sold in any state, the statutes of which make unlawful the manufacture or sale of alcoholic beverages.

At the Midwest Conference on Liquor Transportation Problems, held at Chicago in March, 1940, Illinois, from which large quantities of liquor had been shipped illegally into other states, agreed to adopt a regulation (No. 31) effective April 1, similar to that of Indiana. A recommendation that all states consider the adoption of similar legislation or regulations was made at the Interstate Conference on Liquor Control held at Buffalo in January, 1940.[65]

Local Option

Legalization of the sale of intoxicating beverages in 45 states did not mean that dry sentiment had disappeared. As a matter of practical politics, local option was a compromise with the drys, but local option provisions also were supported on the ground that laws defining the conditions of liquor sale should be strict or liberal in harmony with the customs, habits, and widely accepted modes of personal conduct in each locality, in order to be regarded as just and reasonable and thus gain the support of the preponderant majority of the people.[66]

Basically, a local option election enables a decision on the question as to whether there shall be *sale* of alcoholic beverages within the area. Even in wet areas it is recognized as being in the public interest to forbid the sale of liquor within a certain distance of a school, playground, or church—the distance ranging as high as three miles in some instances.[67] Extending this principle to permit residents of any given

[63] *Id.* 291.

[64] Reg. 1, §10, June 21, 1938.

[65] Ind. Comm. Interstate Cooperation, *Recent Developments in Liquor Control* (Bull. No. 5, Mar. 12, 1940), 11.

[66] Committee on Liquor Control Legislation, *Principles Governing Liquor Control Legislation*, 23 NAT. MUN. REV. 49 (Supp. Jan. 1934).

[67] Cal. Stat. 1933, c. 826, 1023: Liquor may not be sold within three miles of the University Farm at Davis.

locality to prohibit the sale of liquor, or to allow it, according to their wishes, would appear to be an entirely legitimate phase of government activity. Nor should the enforcement problem in dry areas prove extraordinarily difficult, so long as there are legal sources of liquor for those who desire it, at not too great a distance. It is when local option goes beyond the question of sale and seeks to prevent transportation and possession that the more difficult problems of protection arise.

If experience in attempting to control the use of intoxicating beverages has shown one thing it is the virtual impossibility of preventing those who desire to drink from acquiring liquor, by one means or another.[68] Some states have recognized this problem and specifically allow possession for personal consumption in dry areas.[69] Even this, however, is not without its difficulties, of course, as is indicated by the fact that the Georgia Commissioner of Revenue has asked for elimination of the "one quart" law in favor of a measure authorizing seizure of stamped liquor in any quantity in a dry county.[70] In Alabama, bone-dry prohibition returned to 43 counties when the state Court of Appeals ruled that liquor purchased in a wet county could not legally be owned in dry territory. Previously, alcoholic beverages sold in wet counties had been considered as legal property anywhere in the state, under an advisory opinion of the Attorney General.[71] Tennessee, latest of the states to adopt a liquor control law, doing so over the objection of the Governor, has made it possible for dry counties to forbid possession of liquor.[72]

In most state liquor laws the question of possession in dry territory is not mentioned, but local option is specifically restricted to limitation on the sale of alcoholic beverages. To make it possible to fit sales restrictions fairly exactly to the desires of the citizenry some states, notably Maine, Massachusetts, New Jersey, New York, Ohio, Oregon, and Texas, allow the voters to express a preference on several types of questions rather than the simple proposition "Shall the sale of liquor be legalized?"[73]

With liquor interests arrayed on one side and militant prohibitionists on the other, local option might easily make the problem of intoxicating beverage control a

[68] N. C. COMM. TO STUDY THE CONTROL OF ALCOHOLIC BEVERAGES, REPORT (1937) 12. Some indication of this is seen from data showing that between January 1 and August 14, 1936, the North Carolina state highway patrol arrested more persons for drunken driving, in proportion to population, in two "dry" counties than anywhere else in the state. The ten counties with the highest arrest ratios included six "dry" ones, two "wet" counties, and two counties containing "wet" townships.

[69] Ga. Laws, 1st Spec. Sess. 1937, act 297, §4, provided that "the manufacture, possession, distribution and sale" of alcoholic beverages would be legalized in any county voting to tax and control liquor, but if the majority of the voters opposed legalizing liquor the "manufacture, distribution, and sale" would be forbidden—possession being significantly omitted. §23-B made possession of not more than one quart of properly stamped liquor legal anywhere in the state.

Del. Laws 1917, c. 10, as amended by Laws 1933, cc. 12 and 17, provides that while it is illegal to receive from a carrier or possess liquor for sale in any area dry by local option "nothing in this section shall be construed to apply to individuals who may bring into any section of the state of Delaware where the sale of liquor is prohibited . . . upon their person or as their personal baggage, and for their private use, such spirituous liquors not for sale or barter."

[70] *Report on the Operation of the Liquor Law as of January 1, 1939*, p. 10.

[71] N. Y. Times, Jan. 13, 1938, p. 16, col. 1.

[72] Tenn. Public Acts 1939, c. 49, §16.

[73] N. Y. Laws 1939, c. 426. Voters in each city or township can indicate whether they desire to allow or forbid sale of all alcoholic beverages, or liquor, or wine, by the drink, or by the package, or by hotel keepers only, or even in summer hotels only.

political football, with harmful economic and social results. One phase of "protection" in local option areas, therefore, is covered by legal provisions limiting the frequency of such elections, and requiring that a certain percentage of the voters must sign the petition for an election. All but five of the states which permit local option elections have stipulated that they may be held only at specified intervals—five states fixing the minimum interval at one year, 12 at two years, four at three years, and seven at four years.[74] Washington authorizes a vote at each general election, but New York limits local option elections to once every three general elections. New England states, concerned with keeping the local situation in tune with the popular temper, provide for automatic submission of the liquor question to the vote.[75] In a large number of local option areas public opinion is quite stable, but voting strength is almost evenly divided in other sections, and reversals of earlier votes are not uncommon.[76] All but six of the 35 states permitting local option allow governmental units smaller than counties to conduct elections. A large number of such elections are held in areas which are small in size, in population, or in both.[77]

Dry territory tends to mass in certain sections of Alabama, Texas, and a few other states, so that wet areas are somewhat less readily accessible, but in most states the wet and dry localities are quite thoroughly mixed. The interlocking of wet and dry areas, coupled with the fact that the dry islands are often small in size, makes almost impossible the application of such protective devices as were discussed with respect to the dry states of Kansas, Mississippi, and Oklahoma, even though an interstate problem is created when wet territory in one state touches a locality which is dry under local option provisions of an adjoining state.[78] The state can cooperate by not issuing licenses in dry cities and counties and can utilize its inspection and enforcement staff, but the burden of enforcing prohibition conditions following a "dry" election must of necessity fall on local police.

[74] CULVER AND THOMAS, STATE LIQUOR CONTROL ADMINISTRATION: A STATUTORY ANALYSIS (1940) 54-63.

[75] Annual town meetings in Vermont, the regular biennial elections in Massachusetts and New Hampshire, and the biennial election for senators and representatives in Maine.

[76] TEX. LIQUOR CONTROL BD., ANN. REP. (1937) 29; *id.* (1938) 30. Citizens of Howard County, Texas, voted 1,029 to 1,147 on December 10, 1937, to prohibit the sale of alcoholic beverages, only to change their minds on March 11, 1938, and legalize sale of beverages containing not more than 14 percent alcohol by a vote of 2,558 to 1,863, and to take still another stand 10 months later by voting to legalize the sale of all alcoholic beverages by the slim majority of 848 to 779.

[77] DISTILLED SPIRITS INSTITUTE, ANN. REP. (1939) 71. Between the repeal of Prohibition and December 31, 1939, 239 wet-dry elections were held in precincts of the city of Chicago, 160 resulting in prohibitionist victories and 79 in wet victories. TEX. LIQ. CONTROL BD., ANN. REP. (1937) 28-32. Fewer than 200 votes were cast in each of 17 local option elections held in Texas in 1937.

[78] N. C. COMM. REP., *supra* note 68 at 11: "We think it is immediately apparent that conditions beyond which North Carolina has no control have greatly affected conditions in the so-called prohibition counties. After the repeal of the federal prohibition act, Virginia, bordering on North Carolina for 312 miles, and South Carolina, bordering on North Carolina for 324 miles, both legalized the sale of liquor. If North Carolina had no liquor stores, South Carolina and Virginia would provide, or have already provided such stores within 50 miles of approximately two thirds of the population of North Carolina. During 1935 Virginia sold approximately 2,100,000 gallons of liquor, and during the past 12-months period South Carolina has sold approximately 1,400,000 gallons. Unquestionably a part of this crossed the state boundary lines for consumption in prohibition counties."

It follows, therefore, that the ultimate key to the protection of dry localities is a reasonableness on the part of those who make and interpret the liquor control laws. If there were no demand for intoxicating beverages in a particular area, local option would be unnecessary. Adoption of a dry law by local option merely means that a majority of the voting residents are interested in preventing traffic in liquor. The best protection that a dry locality can be given, until the day arrives when temperance education has become far more effective than it has been to date, appears to be a law which forbids the sale of liquor, but does not tell any man he cannot bring a bottle of whiskey in from the outside and consume it in his home if he wishes.

Local option is, in theory at least, a reciprocal device, designed not to promote the cause of prohibition exclusively, but to enable adaptation of liquor control laws to the wishes of the residents of a particular locality—whether they be wet or dry—and recognition of this will, in the long run, prove of assistance in protecting those areas which are really dry. It is a bit difficult, for instance, to justify the reasoning which forbids a city or town from holding an election on the sale of liquor if the parish in which it is located has voted dry, but which holds such city or town is not bound by a parish-wide local option election which favored the sale of liquor, and can hold a local option election of its own.[79] Recognition of the proper place and use of local option must, of necessity, precede effective protection of those localities which vote in favor of prohibition.

Everything considered, of course, the problem of protecting the interests of the dry areas in the United States is only one phase of the difficulties involved in present-day attempts to handle the liquor question. What has been said here, for instance, with respect to interstate relations and such activities as the attempts to eliminate illegal transportation of intoxicating beverages applies with as much force to the monopoly and private license states as to those states which still prohibit liquor. Complete protection of dry areas perhaps must await that apparently far-off day when the consumption of liquor will cease to be a social or political problem.

[79] LA., REP. AND OPINIONS OF THE ATT'Y GEN. (1934-1936), (opinion to R. S. Williams, Nov. 16, 1934) 589, (opinion to N. L. Hower, Nov. 28, 1934) 587.

LIQUOR AND THE CONSTITUTION

AUTE LEE CARR*

Governmental regulation of traffic in intoxicating liquor has long been a problem in American constitutional law. By the middle of the last century the states had begun to regulate, and sometimes prohibit, the transportation, sale and use of intoxicating liquor. At first these regulations were upheld by the Supreme Court even though they applied to liquor being brought in from another state.[1] In 1890 in the case of *Leisy v. Hardin*,[2] however, the Court reversed its earlier position and held that inasmuch as intoxicating liquor was a legitimate commodity of interstate commerce the commerce clause carried a negative implication to the effect that even though Congress was silent on the matter a state could not prohibit the introduction of liquor into the state nor its sale by the importer in the original package. Acting in large part upon the Court's dictum that this impotency of the states could be removed by Congressional action certain states immediately brought pressure to bear on Congress for such legislation, and within a few months Congress passed the Wilson Act.[3] This statute provided that all intoxicating liquors transported into any state or territory for use, sale or storage should upon arrival therein be subject to the laws of such state or territory, and should not be exempt therefrom by reason of being introduced in original packages or otherwise.

The force and effectiveness of the Wilson Act was seriously lessened, some eight years after its passage, when the Supreme Court held that the words "upon arrival" meant delivery by the carrier to the consignee whose right to *receive* the shipment was still protected by the Commerce Clause.[4] As a result, dealers from outside the state were able to solicit orders from individuals, and have the liquor shipped directly to them. To prevent evasion of state prohibition laws by this "mail order" business Congress passed, in 1913, the Webb-Kenyon Act.[5] This Act declared that "the shipment or transportation . . . of intoxicating liquor . . . intended . . . to be received, possessed, sold or in any manner used, either in the original package or otherwise in violation of the laws of the state . . . is hereby prohibited." It was held constitutional in a five to four decision in 1917 in the case of *Clark Distilling Co. v. Western Md.*

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[1] The License Cases, 5 Howard 513 (U. S. 1847).

[2] 135 U. S. 100 (1890).

[3] 26 STAT. 313 (1890), 27 U. S. C. §121 (Supp. 1939).

[4] Rhodes v. Iowa, 170 U. S. 412 (1897).

[5] 37 STAT. 699 (1913), 27 U. S. C. §122 (Supp. 1939).

Ry. Co.[6] But judicial interpretation again intervened and narrowed the scope of the Act. In *Adams Express Co. v. Ky.*[7] the Supreme Court held that where a state permits personal use of liquor it cannot forbid the importation of intoxicants for personal use because the Act consented to regulation only where the liquor was to be received, possessed, sold or used contrary to the law of the state. Presumably to remedy this defect the Reed Amendment[8] to the Act was added. Much more drastic, it provided for federal punishment for persons importing liquor into a state for personal use, even though the state merely prohibited the manufacture and sale of such articles and permitted importation for personal consumption. Two years after its passage the Court upheld the Reed Amendment in the case of *U. S. v. Hill.*[9] Shortly thereafter came the enactment of the Eighteenth Amendment, and for a decade the Federal Government undertook the enforcement of Prohibition upon a nationwide scale.

National Prohibition came to an end in 1933 with the adoption of the Twenty-first Amendment, and liquor control and regulation was returned to the states. The second clause of the Amendment reads:

> "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Congressional debates on Repeal indicate that this section was enacted in an effort to guarantee to the states by the Constitution the same freedom to control liquor that the Webb-Kenyon Act had given them by statute.[10] This was felt necessary first, because the Webb-Kenyon Act had been sustained by a divided Court, and there was always the possibility that the views of the minority might sometime gain the ascendency, and second, because Congress itself might modify or repeal the Webb-Kenyon Act and leave the "dry" states without protection.

Although the second section of the Amendment is substantially the same as the Webb-Kenyon Act, the raising of this statute to the status of a Constitutional provision has narrowed federal power. So long as the provision was embodied in a Congressional act Congress could determine whether liquor in interstate commerce was a subject of national concern solely within the power of the Federal Government or whether it was one of local interest and subject to prohibitions of the states in the absence of Congressional action; but when made a part of the Constitution this power of Congress to determine the status of liquor being transported or imported into a state was taken away and it was fixed once and for all by the Amendment that the state could prohibit the transportation or importation into the state in violation of its laws.

From the history of the Amendment it appears that its purpose, like that of the Webb-Kenyon Act, was to protect "dry" states.[11] The language of the Amendment,

[6] 242 U. S. 311 (1916).
[7] 238 U. S. 190 (1914).
[8] 39 STAT. 1069 (repealed 1936).
[9] 248 U. S. 420 (1918).
[10] 76 CONG. REC. 4170 (1933).
[11] *Ibid.*

however, is subject to a literal interpretation which is much broader, and the Supreme Court, in a series of decisions written by Mr. Justice Brandeis, has taken this broader view.

The first of this series was *State Board of Equalization v. Young's Market Co.*[12] The state of California had imposed a license fee of $500 for the privilege of importing out-of-state beers. The Young's Market Co. imported beer from Missouri and Wisconsin and sold it at wholesale in California. They claimed that the requirement of an importer's license was a violation of the commerce clause and a discrimination contrary to the equal protection clause of the Fourteenth Amendment. The Court, while admitting that the statute would have been an unconstitutional burden on interstate commerce prior to the Twenty-first Amendment, held that the words used in the second clause were appropriate to give the state "the power to forbid all importations which did not comply with the conditions which it prescribes."[13]

The plaintiff's contention that limitation of the broad language of the Amendment is sanctioned by its history and by the decisions of the Court on the Wilson Act, the Webb-Kenyon Act and the Reed Amendment was dismissed by the Court with the observation: "As we think the language of the Amendment is clear, we do not discuss these matters."[14] The plaintiff's claim that the statute was void under the equal protection clause was disposed of by the Court by the statement: "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[15] The Court then went on to point out that in fact there was no discrimination because California brewers were subject to a fee of $750 on another basis.

While there was little doubt but that the *Young's Market* case had removed the check on state powers formerly contained in the commerce clause, it could be contended that the decision did not have the same consequence with respect to the equal protection clause because the Court had in fact found no discrimination and thus its comments in regard to the equal protection clause were *obiter dicta*. The Court's decision in *Mahoney v. The Joseph Triner Corp.*[16] took away the basis for this contention. A Minnesota statute prohibited the importation of liquor where the brands were not registered in the United States Patent Office. Identical liquors which were so registered were admitted. The corporation contended that the statute violated the equal protection clause. The Court held that since the adoption of the Twenty-first Amendment the equal protection clause is not applicable to imported intoxicating liquor, and that discrimination either in favor of domestic over imported liquor, or between various imported liquors is permissible even though it is not an incident of reasonable regulation of the liquor traffic.

Two recent decisions, handed down on the same day, give added force to the conclusion that the commerce clause and equal protection clause are no longer checks upon state power. In the first of these cases, *Indianapolis Brewing Co. v. The Liquor*

[12] 299 U. S. 59 (1936).
[13] *Id.* at 62.
[14] *Id.* at 63.
[15] *Id.* at 64.
[16] 304 U. S. 401 (1937)

Control Commission of the State of Michigan,[17] an Indiana corporation manufacturing beer in that state was prevented from selling its products in Michigan by a Michigan statute prohibiting its dealers from selling any beer manufactured in a state which discriminated against Michigan. Indiana was such a discriminating state. The plantiff sought to enjoin enforcement of the statute, contending that the law should be held void as a violation of the commerce clause, and the due process and equal protection clauses of the Fourteenth Amendment; and asserted that the law was "retaliatory" in punishing Indiana for doing what she was allowed to do under the *Young's Market* decision, that is, to impose regulations and a fee upon importers. The Court denied the injunction and held the statute to be valid, whether retaliatory or not.

In the companion decision of *Finch & Co. v. McKittrick*[18] the Court completely closed the door to any limitation by the commerce clause upon the right of the state to prohibit or regulate the importation of intoxicating liquor. The state of Missouri had enacted an "Anti-Discrimination Act" which prohibited the purchase, sale, receipt or possession by any licensee of liquor manufactured in a "state in which discrimination exists" against Missouri products and declared unlawful the transportation or importation of such liquor into Missouri. Four distillers and an importer, whose products were denied admittance to the state of Missouri, attacked the validity of the statute, urging that the law did not relate to the police powers of the state but was clearly "an economic weapon of retaliation," and that in such an extreme situation the Twenty-first Amendment should not be allowed to render inoperative the power of the commerce clause. The Court said: ". . . since the Amendment the right of the state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause."[19]

It is in connection with, and in light of, this background of the Twenty-first Amendment—its historical development, the intention of its framers, and the broad interpretation given to it by the Supreme Court—that we should approach the problems which arise today in connection with liquor and the Constitution.

One such problem arises in connection with the transportation of liquor *through* a state. Suppose a manufacturer in Kentucky wishes to ship liquor across Virginia for delivery in Maryland. The question arises as to who has power to regulate the shipment in transit across Virginia? Since such a shipment is obviously not for "delivery or use" in Virginia and thus not within the purview of the Twenty-first Amendment it would appear that the state would have no power to prohibit or regulate such an interstate shipment. This was, in fact, the holding of the Supreme Court of Appeals of Virginia in such a case.[20] On the other hand, the shipment is clearly in interstate commerce and since the Twenty-first Amendment is inoperative the Federal Government should have the same power over it as it possessed prior to the Amendment.

[17] 305 U. S. 391 (1938) [18] 305 U. S. 395 (1938). [19] *Id.* at 398.
[20] Williams v. Commonwealth, 169 Va. 857, 192 S. E. 795 (1937).

Closely akin to the problem of the power to regulate transportation through a state is that of state and federal power over the *exportation* of intoxicants from a state. The only case thus far to reach the Supreme Court touching upon this problem is *Ziffrin, Inc. v. Reeves*.[21] In this case the plaintiff, an Indiana corporation, engaged in transporting whisky from Kentucky to Illinois, sought to restrain enforcement of a Kentucky statute requiring that all transporters of liquor be licensed, and that licenses be granted only to common carriers. The plaintiff, a contract carrier, was thus unable to obtain a license, and challenged the validity of the statute under the commerce, due process and equal protection clauses.

The opinion of Mr. Justice McReynolds upholding the statute is not altogether clear, but apparently the Court reasoned about as follows: The state has always had power to regulate the manufacture, transportation and sale of intoxicants within the state and to adopt appropriate measures to effectuate such inhibitions. Here Kentucky seeks by its regulation to minimize the evils attending the liquor traffic and to enforce its revenue measures. The licensing of transporters within the state is a reasonable and appropriate means of accomplishing these ends, and although such licensing will necessarily affect the exportation of liquor insofar as the transportation is within the borders of Kentucky it is better to interfere with interstate commerce to this limited degree than to render ineffective the whole regulatory system.

If instead of licensing *all* transportation within the state, Kentucky had imposed a license fee or a tax upon exports alone it is almost certain that the Court would have declared it invalid. In an early case the Court said that where liquor could be legally manufactured within the state it was beyond the power of the state either to forbid or impede its exportation.[22] In predicting future decisions one must distinguish, therefore, between statutes that aim directly at the exportation of liquor, and those which are directed toward the regulation of the liquor traffic within the state but incidentally affect interstate commerce.

Although the Twenty-first Amendment was brought into the decision in the *Ziffrin* case, it has, in fact, no application to the exportation of liquor from a state because by its very language it is limited to transportation or importation into a state. It would seem clear, therefore, that the respective powers of state and Federal Government over such exports remain the same as before the Twenty-first Amendment.

A third problem is raised by shipments into a state which are not in violation of any laws thereof, and which consequently do not fall within the prohibition of the Twenty-first Amendment. In such a situation does federal power over interstate shipments remain unimpaired? On the basis of the background of the Twenty-first Amendment the answer would seem to be that since it restricts federal commerce power only as to "transportation or importation into a state for delivery or use therein *in violation of the laws* thereof," if the state has not legislated upon the subject of liquor, federal power under the commerce clause remains as before the Amendment.

It has been suggested, however, that there exists here a negative implication com-

[21] 308 U. S. 132 (1939).

[22] Kidd v. Pearson, 128 U. S. 1 (1888).

parable to the negative implication of the commerce clause.[23] To apply such a doctrine in the field of liquor control would mean that the power of the states in the areas set forth in the Twenty-first Amendment negatives by implication the possibility of federal action even when the state is silent unless a foothold of national interest is found.[24] Such an analysis seems inconsistent either with the literal or historical interpretation of the Twenty-first Amendment. It disregards the fact that the Twenty-first Amendment does not operate as an affirmative grant of power to the states, but rather as a limitation upon federal power in that Congress cannot authorize the "transportation or importation of liquor into a state for delivery or use therein in violation of the laws of such state." When not subject to this restriction, federal power over liquor in interstate commerce is in all respects the same as before the Amendment.

In the case of *Collins v. The Yosemite Park & Curry Co.*[25] the problem of who has the power to regulate liquor within a federal territory was first raised. California had ceded to the United States the territory which is included in Yosemite National Park, reserving the power to tax in this area. The Yosemite Park Company, engaged in the sale of liquor in the Park, refused to obtain a California license or comply with California regulations. The state contended that the Twenty-first Amendment gave it the right to regulate the sale and use of alcoholic beverages within the Park. The Supreme Court held that although the state had the power to tax, the federal power of regulating intoxicating liquor in federal territory is not affected by the Twenty-first Amendment. Such a conclusion seems inevitable in light of the background of the Twenty-first Amendment.

It has already been pointed out that the Twenty-first Amendment is substantially the same as the Webb-Kenyon Act. There is one principal difference in the wording of the two. The Webb-Kenyon Act uses the phrase "shipment and transportation" while the Twenty-first Amendment employs the words "transportation or importation." It is not certain what the framers intended by the term "importation." It may have been that the words "transportation or importation" were used in order to deal effectively both with the transporter, the one actually carrying the liquor across state lines, and the importer, the person having the liquor brought from one state to another. If, however, "importation" is taken in its more technical constitutional meaning, conflicts may arise between state regulation and the power of the Federal Government to conduct foreign affairs and regulate foreign commerce. Suppose, for example, that the Federal Government agrees by treaty with a foreign nation that citizens of that country residing in the United States shall be permitted to import liquor into this country. One of the states then passes a law forbidding the licensing of aliens to import or sell liquor within the state. Obviously, to uphold the state law would be to allow it to thwart the Federal Government in its sovereign power to make agreements and treaties with foreign powers. It would, in reality, amount to

[23] de Ganahl, *The Scope of Federal Power Over Alcoholic Beverages since the Twenty-first Amendment* (1940) 8 GEO. WASH. L. REV. 819, 875.
[24] Reconsider in this connection the first paragraph of this article.
[25] 304 U. S. 518 (1938).

a surrender of sovereignty in this field to the state. Should such a case arise the Court might advert to any one of three possible approaches:

First, it might hold that under the Twenty-first Amendment the state has power to prohibit the bringing of liquor into the state under whatever conditions it chooses without regard to the effect of such prohibition upon the federal power over foreign commerce and international relations.

Second, it might interpret the Twenty-first Amendment so as to preclude the state from thwarting the Federal Government in the exercise of these sovereign powers by limiting the application of the Amendment to interstate commerce.

Finally, the Court might follow its decision in the case of *U. S. v. Curtiss-Wright Export Co.,*[26] that the powers of the Federal Government in respect to foreign affairs do not rest exclusively upon the Constitution but were derived directly from the crown and inhere in the nation as a sovereign. It would be but a short step to hold that this sovereign power had not been surrendered to the states by the Twenty-first Amendment.

While there is good reason for believing that the Court, if faced with such a situation, would take the second or third approach, the literal interpretation given the Amendment in the series of decisions by Mr. Justice Brandeis suggests that the first approach is not wholly out of the question.

To date the actual litigation in respect to matters of foreign commerce seem to have arisen in connection with the enforcement of the Federal Alcohol Administration Act,[27] under which the Federal Government has entered a broad field of liquor control and regulation. The Act requires that each distiller, rectifier, wine manufacturer or importer secure a federal permit. Through the exercise of discretion in granting, denying, suspending and revoking permits the federal administrative agency can exclude undesirable elements from the industry and enforce the prohibitions of other sections of the Act.

Section 5 relates to abuses and evils which were prevalent in the pre-Prohibition era. Exclusive sales agreements, the "tied-house," commercial bribery and consignment sales are all defined and made unlawful. It fixes the kinds of labels to be used on the various types of liquors, and designates the matters which must appear on the label to inform consumers as to the identity and quality of the contents. It precludes all liquor advertising unless it conforms to prescribed standards. Section 8 forbids interlocking directorates and similar practices which might result in a recurrance of the notorious "whiskey trust."

In light of the corruption, political interference and tax evasion of part of the liquor industry before Prohibition, the regulations of the Act seem reasonable and expedient. It has been contended, however, that the labeling provisions of the Act are unconstitutional. In *Jameson & Co. v. Morgenthau*[28] the plaintiff was denied entry of liquor from England which was not labeled according to federal require-

[26] 299 U. S. 304 (1936).

[27] 49 STAT. 977, 27 U. S. C. §§201-212 (Supp. 1939). While the F. A. A. has been abolished its functions in the enforcement of this Act are carried on by the Alcohol Tax Unit. See O'Neill, *supra* p. 58 *et seq.*

[28] 307 U. S. 171 (1938).

ments. The importer brought injunction proceedings alleging that the Twenty-first Amendment gives the states complete and exclusive control over commerce in intoxicating liquors and hence that Congress no longer has authority to control the importation of these commodities into the United States. Here again is evidenced the misconception that the Twenty-first Amendment is an affirmative grant to the state of exclusive power over interstate commerce in liquor. We have already observed that such an analysis is inconsistent with either a literal or a historical interpretation of the Amendment. Congressional power over liquor is derived from its constitutional authority to tax, regulate commerce, establish and operate a postal system, and from its war and treaty powers. The sole effect of the Twenty-first Amendment is to take away from Congress the power to authorize the transportation or importation of liquor into a state in violation of its laws. With this one exception the power which Congress had over liquor before the Twenty-first Amendment remains unimpaired. In the *Jameson* case there was no attempt on the part of the Federal Government to authorize a shipment into a state in violation of its laws. On the contrary, a shipment was being excluded before reaching state borders and the power of the Federal Government in such an instance seems clear.

We have observed how the Supreme Court has upheld state barriers and discriminations against out-of-state liquors. That such a policy of state protectionism in respect to the liquor industry is injurious seems clear. It restricts production in areas where it can be more advantageously carried on and fosters it in areas less favorably situated, thus increasing costs to the consumer. It necessitates an elaborate administrative machinery in each state to enforce its provisions for exclusion and discrimination. It will probably lead to further trade barrier legislation of much more serious consequence. It is likely that of all the problems raised by the adoption and broad interpretation of the Twenty-first Amendment, that of stemming the rising tide of state barriers in the interstate liquor sphere is the most pressing.

Barring Constitutional Amendment or the reversal by the Court of its present position three possible lines of remedial action are open:

First, although the possibility of direct Congressional intervention to halt the abuse of state power seems to have been precluded by the Supreme Court's decisions interpreting the Twenty-first Amendment, it would appear that Congress could indirectly discourage the development of state barriers by such methods as the conditional grant-in-aid, or by refusing federal cooperation to states which have discriminatory laws and regulations.

Second, the Supreme Court, without being inconsistent with its present position that a state can exclude out-of-state liquor introduced in violation of its laws, can prevent a certain amount of discrimination by resort to the doctrine of unconstitutional conditions. Thus if State X permitted a distiller of another state to do business within the state only upon condition that he forego his right to sue in a federal court, such a provision could be invalidated as an unconstitutional condition.

Finally, of course, the states may, after cooperative investigation like that undertaken by the Council of State Governments, adopt appropriate remedial measures and follow a policy of self-restraint and cooperation.

INTERSTATE BARRIERS IN THE ALCOHOLIC BEVERAGE FIELD

Thomas S. Green, Jr.*

Trade barriers between states have become so numerous that many look upon them as insurmountable obstacles to a return to economic prosperity. To what extent they do obstruct the normal flow of goods in interstate commerce cannot readily be determined, nor can their effect on our economic welfare be precisely measured. It has been demonstrated, however, that these barriers have successfully shrunk or cut off state or regional markets to certain products which previously were freely distributed, and that they have stimulated economic and political sectionalism within the country.

Some 1400 restrictions, or an average of about 30 to a state, have been established by statutory provision or administrative ruling. Many others, less easily discernible, undoubtedly exist. Well over a hundred of these affect directly alcoholic beverages, and, as will presently be described, have imposed hardships on the interstate shippers of wine, beer and distilled spirits. These laws and regulations operate to the protection of producers and distributors within a state by imposing various deterrents to importations from sister states. They have led to the enactment of defensive retaliatory measures by states subject to the discriminations, and in return to counter-retaliations.

Interstate trade barriers, which are the counterpart in the national scene of tariff walls erected against international trade, are for the most part offsprings of the depression. They began to find their way into the statute books in 1931, the first legislative year following its onset. In a sense their appearance was a normal development, for, as producers and distributors within a state saw their markets gradually becoming more and more restricted, it was only natural that they should turn to the state legislature for assistance. The legislature, whose sphere of jurisdiction was limited by state boundaries, followed the only immediate recourse, which was the enactment of protective measures, even though these did result in discriminations against persons in neighboring states. With amazing rapidity this practice of establishing trade barriers has multiplied and spread within the last decade until all states at the present

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time have enacted one or more such restrictions. Forty-three states alone are party to alcoholic beverage trade barriers.[1]

The situation that developed following the conclusion of the Revolutionary War offers a disturbing parallel to the present tendency. Before the adoption of the Constitution, the states economically played the roles of small independent nations, jealously protecting their own industries, and indulging in vicious commercial discriminations and reprisals. When three New England states closed their ports to British shipping, Connecticut threw hers wide open and imposed restrictions on imports from Massachusetts. On the eve of the Constitutional Convention in 1787, New York City was conducting an interstate trade war. Its merchants saw thousands of dollars flowing out of the city in payment for firewood from Connecticut, and butter, chickens and garden vegetables from New Jersey. In order to protect the local industries, they imposed high clearance fees and duties on these imported goods. Retaliation soon took place. New Jersey taxed New York's Sandy Hook lighthouse $1800 a year, and Connecticut organized a businessman's meeting at New London at which every merchantman signed an agreement to suspend commercial intercourse with New York City.[2] Trade between these states became stagnant, and hostilities reached white heat. Comparable in nature were territorial disputes which frequently flared into minor warfares that brought interstate trade to a standstill. The quarrel between Connecticut and Pennsylvania over the Wyoming valley led to a number of armed conflicts; Vermont and New Hampshire disputed sovereignty over some Connecticut River towns, a conflict which soon involved New York and lined threatened frontiers with militia.[3]

One of the dominant factors in motivating the leaders of that period to frame a federal constitution and urge the adoption of a strong central government was the growing prevalence and intensity of these interstate barriers. As James Madison expressed it in a letter urging a constitutional convention:[4] "The practice of many states in restricting the commercial intercourse with other states and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the Federal Articles, is certainly adverse to the spirit of the union, and tends to beget retaliating regulations, not less expensive and vexatious to themselves than they are destructive to the general harmony."

The Constitution provided that "the Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[5] By virtue of the delegation of supreme control over interstate commerce to the national government, a large free trade area was supposedly established. Though the commerce clause has received varying interpretations since Marshall handed down the first decision involving its construction in 1824, its enforcement by and large

[1] For listing of the alcoholic beverage trade barriers, see GREEN, LIQUOR TRADE BARRIERS (Public Administration Service, 1940), 27-32.

[2] FISKE, THE CRITICAL PERIOD IN AMERICAN HISTORY, 1783-1789 (1888) 145-146.

[3] *Id.* at 147-153.

[4] Quoted in statement of Frank Bane, *infra* note 7. [5] Art. I, §8.

permitted the rapid settlement of the nation's vast unexplored territory, the developments of its resources, and the production and distribution of goods without significant restrictions to the flow of interstate commerce by individual state action.

A century and a half following the adoption of the Constitution, the commerce clause, as given meaning and substance by the Supreme Court justices, is showing itself less effective in preserving a free national market. State trade barriers are again emerging in our economic life, and, apparently, without violation of the legal interpretations assigned to the commerce clause, though decidedly in violation of its underlying principle. Our economy is being diverted from its traditional policy of unhampered domestic trade by a new and broader application of the residual state taxation and police powers. If these are used solely to promote the health, safety, and living standards of the people, their use is not subject to criticism. But this has not always been the effect, nor the intent. Their enforcement frequently gives economic protection to state residents by discriminating outright against the residents or products of other states, thus circumventing what the commerce clause was specifically framed to prevent.

Trade barriers affecting alcoholic beverages are to be distinguished from other trade barriers in that they are legally protected by the Twenty-first Amendment to the Constitution,[6] which provides that the transportation or importation into any state of intoxicating liquors, in violation of the laws thereof, is prohibited. Congress has in substance said that the commerce clause does not apply to the interstate shipment of alcoholic beverages. The states are free to regulate domestic and imported liquors as they please. They can favor one beverage as against another, or one state as against another; they can impose any license fees, excise taxes or merchandising restrictions they may select. At their discretion, they may establish rigid prohibition, permit unrestricted importation and sale of alcoholic beverages, or adopt any regulatory program that may fit within these two extremes.

Yet, despite this legal sanctity, alcoholic beverage trade barriers differ little from other trade barriers in character or effect. Thus a few general examples will illustrate the nature and extent of these commercial discriminations established by the states under the protecting fold of state taxation and police powers.[7] Under the taxation power, half the states have adopted excise taxes on oleomargarine to protect local dairy industries, and high license fees are levied on the manufacture and sale of this and other butter substitutes. In some states the excise tax does not apply if local products are used in the manufacture of oleomargarine. In a similar fashion, license fees and excise taxes are levied on the importation of other agricultural products.

A number of states which have adopted the sales tax for the raising of revenue have supplemented it with a use tax in order to cover the sales of goods imported from other states. When the law fails to provide that the use tax shall not be imposed on

[6] See *supra*, p. 710 *et seq.*

[7] See statement of Frank Bane, Exec. Dir. of the Council of State Governments. Statement to the Temporary National Economic Committee (Mar. 18, 1940) 3-5.

products which have paid a sales tax in the state of origin, it is generally conceded that interstate commerce is burdened more heavily than intrastate commerce, and that a trade barrier results.

Motor vehicles, especially trucks, are affected by cumulative taxes as they travel through two or more states, although reciprocity agreements in license fees are being entered into by an increasing number of states. Special license fees on independent truckers who travel from state to state are also frequently levied. One method of enforcing these requirements and of restricting importations is by port-of-entry laws, some of which often provide that motor vehicles must stop at the state border for payment of registration fees or special mileage and gasoline taxes as a condition precedent to entering the states.

The police power, implemented to protect the public health and safety, is another instrument for the enforcement of trade barriers. Ports-of-entry, besides being tax collection stations, are often used for checking equipment, weight, and insurance requirements of trucks, and so forth. The purpose is the very commendable one of insuring safety on the public highways or of collecting public revenues, but these statutes sometimes operate to obstruct the free flow of trade. Some of these ports are established to inspect and embargo plants, fruits, and vegetables, and in general to serve as quarantine stations. Quarantines are sometimes essential for the protection of public health, but they can and frequently do impose restrictions which extend beyond the minimum requirements for this objective.

Inspection requirements are also often used to control, restrict, and exclude dairy products, livestock, and horticultural and agricultural products. Sometimes these are justified in terms of public health, at other times not. For example, some states require that all milk shipped into their markets must come from dairies inspected by their agents, and then fail to provide for inspection of out-of-state dairies except in case of market shortage. Certificates testifying that livestock is pest and disease free are required in some twenty-five states, a tool that may upon occasion serve as a device to impose unnecessary discriminations. Many other legitimate regulations such as these have, under administrative ruling, developed into trade barriers.

Lack of uniform labeling laws constitutes one of the most troublesome restrictions to producers. Proper labels are imperative for adequate regulation, but when a specific state law calls for imprinting the state of origin and other extraneous information, then the intent may well be simply to foster a "buy at home" movement. Other states list detailed specifications for agricultural products, and six set a maximum grade for "fresh" eggs which in practice can be met only by domestic hens.

Many states give preference to resident laborers and contractors, and to domestic products used on public works. Many specify that public institutions can purchase only domestic products or supplies, or indirectly permit the payment of higher prices for state-produced commodities.

Even though in a few instances the states have been free to use taxation and police powers where interstate discriminations were created, such as in giving preferential

treatment to resident laborers, contractors, and materials,[8] and in exacting compensation for use of state highways,[9] the Court has not neglected the principle of the commerce clause nor failed to condemn harmful barriers. In 1935, in a case which involved the constitutionality of a New York milk price-fixing agreement, Justice Cardozo stated that[10] ". . . one state . . . may not place itself in a position of economic isolation. . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with products of another state or the labor of its residents."

State importing regulations do not constitute interstate trade barriers merely because they impose taxes on out-of-state alcoholic beverages, and license fees or other restrictions on their distributors. To the extent that they limit distribution, curtail production, or stimulate uneconomic production, they affect adversely the normal economic processes. This is seldom brought about unless the regulatory measure provides for rate differentials or other differentials which tend to discriminate against out-of-state products and in favor of domestic ones. A trade barrier may exist in principle or in practice. If the differential remains unenforced or ineffective, the barrier is one in principle only; if it actually works an economic hardship on the importer by discriminating against him, the barrier becomes one in practice.

The Liquor Control Committee of the National Conference on Interstate Trade Barriers defined alcoholic beverage trade barriers as:[11] ". . . any legislation, rule, or regulation which is designed to subsidize or protect from competition citizens of any state who are engaged in the production or distribution of malt beverages, wines, and distilled spirits. More specifically, it refers to higher excise taxes imposed on products manufactured or packaged outside the state than are imposed on those manufactured or packaged within the state; higher license or other fees imposed on out-of-state manufacturers or wholesalers than are imposed for a like privilege on local manufacturers or wholesalers; and other shipping or merchandising restrictions directed to the same end."

So many factors influence the marketing of a product that indices for the purpose of measuring the effect of any one determinant are all but impossible to formulate. It is therefore most difficult in marginal cases to state conclusively that a law or administrative regulation which sets up differentials actually creates a trade barrier. If the differentials are large, the likelihood is that any decrease in importations since its enforcement is attributable to it; if they are small, the question is more debatable. For purposes of this discussion, therefore, all such differentials will be considered on a par, irrespective of the extent to which they probably restrict importations.

As stated above, trade barriers which restrict the state importation of alcoholic

[8] Atkins v. Kansas, 191 U. S. 207 (1903).

[9] Hendrick v. Maryland, 235 U. S. 610 (1914); Kane v. New Jersey, 242 U. S. 160 (1916); Clark v. Poor, 274 U. S. 554 (1926); Sprout v. South Bend, 277 U. S. 163 (1927); Morf v. Bingaman, 298 U. S. 407 (1935); Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U. S. 72 (1939); Clark v. Paul Gray, Inc., 306 U. S. 583 (1939).

[10] Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 527 (1935).

[11] NAT. CONF. ON INTERSTATE TRADE BARRIERS, PROCEEDINGS (1939) 107.

beverages can be placed in three groups: (1) license fee differentials; (2) excise tax differentials; and (3) merchandising restrictions.

In the first group we find a number of practices. According to recent compilations,[12] 21 states[13] require out-of-state producers who have no place of business within the state and wish to sell to licensed wholesalers or state monopolies, to obtain a license or certificate authorizing them to do business. This fee which in substance constitutes a second license on these producers, is as high as $1000 in Rhode Island. Although this requirement may not impose too great a hardship on large national shippers who can absorb the license cost in their general overhead without raising prices, the smaller producers may well be deterred from shipping into a trade barrier state, particularly if he sees no reasonable assurance of opening a market and reaping a profit that will cover the cost of the fee.

A discrimination is again created when wholesalers who distribute alcoholic beverages produced outside of the state are required to pay a higher license fee than those who distribute solely domestic beverages.[14] This margin of difference, established in ten states, has reached the figure of $650 (Arkansas). Naturally, the number of importing wholesalers in a state is thereby limited, and, in all probability, the amount of imported alcoholic beverages available for purchase is diminished. Higher license fees, moreover, are likely to raise prices. A third trade barrier which fits within this classification gives preferential status to local farmers. In thirteen states,[15] lower license rates are given to those who manufacture from native-grown grapes than from imported grapes. Occasionally this differential may apply to fermentation by the farmers as opposed to the local wine manufacturers, but by and large this farmer subsidy is to protect the state-wide industry. Maine, for example, uses a sliding scale differential of $100 to $3000, depending on the proportion of native to imported grapes, while other states assess two separate fees.

Excise tax differentials constitute the second group of trade barrier measures. These, affecting wine primarily, are found in eight states,[16] and consist of a higher gallonage tax on imported beverages than on those domestically produced. If the difference is substantial, the imported wines will probably retail at a higher price than native wines of a comparable production cost. Such is undoubtedly the case in Arkansas, where the tax differential amounts to forty-five cents per gallon, and Michigan, where it is even one cent higher.

Among the merchandising requirements appear a number of miscellaneous provisions which tend to erect interstate trade barriers. The manufacture of beer with at least 66⅔ percent barley malt is a measure adopted by five states.[17] A subsidization of local barley farmers is evidently here intended, for the states which have passed

[12] See GREEN, *op. cit. supra* note 1.

[13] Ala., Cal., Colo., Conn., Idaho, Me., Mass., Mich., Mo., N. H., N. J., N. M., N. Y., N. C., Pa., R. I., S. D., Tenn., Utah, Vt., Wash.

[14] Ark., Colo., Del., Ill., Md., Nev., Ohio, Pa., Tenn., Wash.

[15] Ala., Ark., Idaho, Iowa, La., Me., Md., Ore., R. I., S. C., Tex., Va., Wash.

[16] Ark., Ga., Me., Mich., Ore., Pa., Va., Wash.

[17] Iowa, Minn., N. D., Ore., Wis.

these laws are largely agricultural. In a few instances,[18] local wineries are permitted to sell directly to the consumer, while imported wines must be marketed through a licensed wholesaler. Two states, Utah and Maine, require the state liquor stores to display native-grown products in preference to out-of-state ones provided prices and quality are comparable. The issuance of manufacturers' and wholesalers' licenses is conditioned upon residence within the state from one to three years in eight[19] states. Registration of brand names at a specified fee is a requisite for importation in two others.[20] Ohio has methods all its own for protecting the local wine producers. Blends must contain at least 51% native wine, and wines may not be imported in tank cars, although exportation by this method is permissible.

The exemption of exports from excise taxes, or sizeable reductions in these taxes, is a practice prevalent in nearly two thirds of the states. Though not trade barriers as here defined, but rather the converse, these measures fit into the trade barrier picture, for they assist exporters in competing on an equitable basis with alcoholic beverages in out-of-state markets, even though they may be obliged to pay certain discriminatory fees or taxes before they can ship into those markets.

Closely allied to the principle incorporated in these exemptions, but more direct and vicious in nature, are "retaliatory" and "anti-discriminatory" laws.[21] Retaliations, which have received legislative approval in five states, provide that an equal discrimination shall be imposed on alcoholic beverages of states which, by their laws, discriminate against its alcoholic beverages. More far reaching are the anti-discriminations, for these prohibit in substance the state importation of all alcoholic beverages from a state which discriminates against any one of its beverages. The Indiana law is the most all-inclusive, for it permits the alcoholic beverage board to impose additional fees and taxes, to prohibit importations completely, or to enter into reciprocity agreements with discriminating states, at its discretion.

Although general economic adversity can be assigned as causal factor for the establishment of the trade barriers, the motivations behind those affecting wine, beer and distilled spirits can be more clearly defined and distinguished. Likewise, although their effects cannot always be accurately determined, some examples can be cited of the economic restrictions they have created.[22]

Protection of local grape-growers and their wineries can be pointed to as the main reason for adopting wine discriminations, although in a few cases they may have been promulgated primarily to increase tax collections. The arguments supporting this contention run as follows: Only a limited number of states produce enough wine from locally cultivated vineyards to export in large quantities. Among them are California, which out-produces all her sister states combined, followed, in tonnage yields, by New York, Ohio, Washington, Michigan, New Jersey, Arkansas, North

[18] Iowa, Wash.

[19] Colo., Mass., Ohio, S. D., Tex., W. Va., Wis., Wyo. [20] Neb., S. D.

[21] Anti-discriminatory: Ala., Ind., Mich. (applies only to beer), Ore., Pa.; Retaliatory: Conn., Fla. (applies only to wine), Ohio, Pa., R. I.

[22] The following discussion of motivations and effects is taken from GREEN, *op. cit. supra* note 1.

Carolina, Oregon, Illinois, Minnesota, and Georgia.[23] Yet 22 of the remaining states produce wine. In most of these, the grapes are grown by small farmers who allot a part of their acreage to grape vines, with the intention of fermenting on their own premises for sale in a nearby market. Since wine must be made near the site of the vineyards, because grapes are both too bulky and too perishable to be transported any great distances, it is evident that most wine production is concentrated in a few localities. This factor, along with the disparity in processing costs between small and large wineries, is the important source of wine trade barrier legislation. The small farmers and wineries fight to preserve their local markets for their own products.

The situation is somewhat different with respect to beer. In the first place, some of the necessary agricultural products are grown in only a few areas. Such is the case with hops and rice; barley is malted mainly in three states; and corn, the fourth ingredient, is grown in all states, though obtained by the brewing industry largely from the midwest farm belt. The problem, therefore, is not one of intensive competition among farmers. Where it is to be found is among the breweries. During 1937-1938, some 615 were listed, scattered in 40 states. Half a dozen had but one brewery, while the figures ran as high as 84 in Wisconsin and 103 in Pennsylvania. Thirteen of these states produced over a million barrels each a year, and accounted for 87½% of the national total.[24] Thus we find that although both farmers and brewers are interested in maintaining unrestricted interstate shipment of agricultural products, the marketing of the beer itself is subject to stiff competition between local breweries in many markets as well as between the national and local brewers. Individual brewers, most of whom do not anticipate shipping into other states, want protection in their already overcrowded markets, and seek the support of the legislature in this endeavor. In 24 beer producing states, one or more local brewers' associations have been organized, whereas only three national or regional associations exist. This further accentuates the chaotic condition of the brewing industry, and tends to place emphasis on its state rather than its national aspects.

No clearly defined causes can be attributed to trade barriers affecting distilled spirits. Only 28 states produce at all, and 98% of the total gallonage is accredited to nine states. Of this group, two have not passed any discriminatory measures and

[23] Production of Grapes for Wine in 1938, Estimated by the Wine Institute. Letter to the author.

California	525,000 tons	Michigan	1,902 tons	Oregon	266 tons
New York	9,043 "	New Jersey	886 "	Illinois	259 "
Ohio	4,349 "	Arkansas	869 "	Minnesota	81 "
Washington	2,595 "	N. Carolina	547 "	Georgia	78 "

[24] Statistics on Fermented Malt Liquors and Cereal Beverages: Fiscal Year Ending June 30, 1938 (U. S. Treas. Dept., Bur. Int. Rev., Alc. Tax Unit, 1938) p. 6 (Production in gallons).

	Breweries	*Production*		*Breweries*	*Production*
California	38	2,568,639	Missouri	21	3,752,671
Illinois	62	3,958,465	New Jersey	17	3,391,847
Indiana	17	1,843,596	New York	65	9,005,905
Maryland	11	1,309,982	Ohio	54	3,976,666
Massachusetts	16	1,309,953	Pennsylvania	103	6,331,301
Michigan	47	2,862,378	Wisconsin	84	6,164,727
Minnesota	23	2,742,802			

the remainder have insignificant ones. As for the raw materials, there seems to be little geographical relation to the sites of distillation. The only conclusions reached are that distilled spirits trade barriers are offshoots of the trade barrier movement and find their roots in legislation protecting beer and wine, rather than in economic factors of their own.

Motivations are important to analyze in themselves, but they only become really significant economically if the ultimate objective, that is economic protection, is accomplished. The overall effects of trade barriers on our economic life cannot accurately be determined. But specific instances in which they have created economic hardships can be isolated and analyzed.

Most of the wine produced in this country comes from California. In 1938, figures were nearly 55,000,000 gallons for California and 7,500,000 gallons for the other 47 states. With the exception of California, the individual states consumed most of their own wine. California in that year, however, exported 39,000,000 gallons. Any wine trade barriers, therefore, were probably first directed at California's products. Their effect on this state has been decidedly noticeable throughout the country. Between 1937 and 1938, the consumption of California wine dropped over 3,000,000 gallons, while that of the other states increased by more than 2,700,000 gallons.[25]

Among the other 11 large grape-growing states, five—Arkansas, Georgia, Michigan, Oregon, and Washington—have enacted significant discriminations by excise tax differentials. In 1938, Michigan consumed less than 180,000 gallons of non-native wine, primarily as a result of a 46 cent tax differential. On the other hand, Ohio, where trade barriers are far less stringent, consumed, with only a slightly larger population, 2,400,000 gallons of non-native wine. Washington consumed less imported wine in 1938 than 1935, at which time it had not enacted a trade barrier law, while consumption of native wines rose from 62,000 gallons to 655,000. A similar development is to be found in Arkansas. After the gallonage tax on out-of-state wine was increased from ten cents to 50 cents, the tax on local wine remaining constant at five cents, consumption of non-native wine dropped from 323,000 gallons in 1937 to 181,000 gallons in 1938, while that of native wines increased from 135,000 to 168,000 gallons. Most significant when examining the effects nationally of these wine trade barriers is that total consumption in the five states listed above has shrunk, whereas the per capita consumption in the other large grape-growing states has increased.

In contrast, trade barrier states which do not rank among the large producers, show, with few exceptions, increased per capita consumption figures from 1934 to 1938. A number of explanations are at hand. The trade barriers may be unimportant or ineffectively enforced. More likely, however, is that local production in these states did not meet the market requirements, and out-of-state wines were sold despite the

[25] United States Consumption of Wines According to Place of Production: 1935-1938 (In Gallons).

Year	California Wine	Wine Made in Other States	Year	California Wine	Wine Made in Other States
1935	40,049,000	2,960,000	1937	58,046,000	4,835,000
1936	53,934,000	2,805,000	1938	54,990,000	7,595,000

barriers and resulting higher prices. Supporting this argument of an unsaturated market are the per capita consumption figures of Indiana, a small producer—.084 gallons—compared to those of New York and California, the two largest producers, which are respectively .758 gallons and 3.267 gallons.

With regard to beer, less convincing factual data on the effect of trade barriers are available. It is reported that about 85% of the breweries wish to ship in interstate commerce. How many are deterred by trade barriers is difficult to determine, though some estimates have been made.[26]

Vermont's $750 certificate of approval on out-of-state breweries has perhaps had the most far-reaching effects. A survey shows that although 74 breweries would like to ship into this state, only 34 actually do. In a large proportion of these cases it is the certificate which has deterred them. In New Hampshire, where the fee is $500, only 44 out of 58 interested brewers market their beer in the local markets. Thirty-three out of 62 ship into Maine, where the certificate costs $100. And in Colorado, which requires importing brewers to obtain a wholesaler's license at $100 for 3.2 beer and at $500 for heavier, reports show there are only 18 importers, although 30 breweries shipped into this state before enactment of this trade barrier law.

Another type of trade barrier has prevented many brewers from shipping into Massachusetts, New York, and New Jersey. These states impose licenses on out-of-state solicitors, at $300, $500, and $750 respectively. Forty-one brewers have obtained such licenses in New Jersey, but another 31 would otherwise solicit. For New York the figures are 28 and 47, and for Massachusetts, 10 and 57. Naturally, breweries can fill orders received out of the state, thus avoiding the restrictions, but breweries must convince consumers of the quality of their product first, and this is difficult to do without actually placing it in the local market.

The distilled spirits industry has undoubtedly been harmed by trade barriers. The writer has not been able to determine the extent, however. Since production is concentrated in nine states, competition in any one market is more intense between the regional or national distributors than between local distillers on the one hand and importers on the other. Hence, any trade barriers probably fail to protect local producers to any great extent.

Trade barriers are on the decline. During the 1939 legislative session, few such new laws were enacted and a number were repealed. Several groups were instrumental in bringing this about. The beer, wine and distilled spirits industries campaigned vigorously against liquor trade barriers and lobbied in all legislatures where measures were pending. The states exerted pressure on each other through retaliatory and anti-discriminatory laws. The Federal Government, first through the Federal Alcohol Administration, and later through a Joint Interdepartmental Committee on Trade Barriers, did much to reverse the trend. The most successful effort to combat the trade barrier movement, however, was that initiated by the Council of State Governments.

[26] Information supplied to author by U. S. Brewers' Association.

After a few preliminary regional conferences, the Council, at the request of the Governors' Conference and its Biennial General Assembly, called a National Conference on Interstate Trade Barriers in April, 1939. Research material showing the nature and extent of the trade barrier development was prepared for this occasion. Nationwide publicity was received. The special committee, meeting to consider liquor trade barriers, called on all states to repeal existing discriminatory laws and to refrain from enacting others, and gave its approval and support to the interstate compact as a method of removing them.[27] Since then, a number of follow-up regional conferences have been held. Largely due to these and to the nationwide recognition of the seriousness of this problem, trade barriers now seem to be on the decline.

To avoid regulations which tend to establish trade barriers, liquor control laws and administrative rulings should be made applicable only to in-state licenses, and possibly to out-of-state solicitors who actually do business within the state. The small local producers should naturally receive adequate protection from unethical business practices of importers, but no direct subsidization should be afforded any in-state producers. Feasible and workable methods for proper and adequate state regulation are possible without resorting to trade barriers. On these grounds, as well as because of their danger to the national economy, such discriminatory measures should be vigorously opposed.

[27] *Loc. cit. supra* note 11.

TAXATION IN THE ALCOHOLIC BEVERAGE FIELD

Charles F. Conlon*

Alcoholic beverages and the traffic in them have always been well-recognized objects of taxation. Both as a revenue producer and as a means of curtailing the consumption of these beverages the tax upon them has been in use for a long time and in many countries.[1] In this country before the Revolution, import duties on spirituous liquors were common in all the southern colonies and the New England colonies, and New York taxed their manufacture and sale.[2] During the Revolution, New York, Pennsylvania and some of the southern states were loath to impose direct taxes but they did raise revenue from liquor and other excises; while in the period shortly after the Revolution, liquor and other internal excises were an important component of state revenues.[3]

During the Confederation a proposal that the central government levy an excise on liquor made no headway. But only two years after the ratification of the Constitution our first national tax bill, a customs measure, included import duties on liquors. Two years later, in 1791, the first national internal excises included a tax on whiskey. The whiskey tax was discontinued in 1802 and it was not until the exigencies of the War of 1812 demanded that more revenue be raised that liquor was again taxed. Revenues from import duties declined sharply in the years after 1811, and the special session of Congress in 1813 imposed license taxes on stills and on the retailing of both wines and spirituous liquors.[4] After a few years the tax was again abandoned, not to be used again until in 1862, when Civil War financing began to present an acute problem. From that time, up to the present, we have had national taxes of one type or another on alcoholic beverages.

The states and local governments also levied taxes on the traffic in alcoholic beverages but these taxes were in the nature of license or occupational taxes rather than excises on production or sales as was the federal tax. As a matter of fact, in the prosperous days of the 1790's when the states were receiving large incomes from their holdings of federal bonds, state bank stocks, sales of public land and confiscated loyalist properties, the liquor tax was one of the few that was generally kept in effect.[5]

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[1] See the summary statement in the Wickersham Report. Nat. Comm. on Law Obs. and Enf., *Report on the Enforcement of Prohibition Laws of the United States*, H. R. Doc. No. 722, 71st Cong. 3rd Sess. (1931) 3; Twentieth Century Fund, Facing the Tax Problem (1937) 199.

[2] Shultz and Caine, Financial Development of the United States (1937) 17-18.

[3] *Id.* 65, 79.

[4] *Id.* 141.

[5] *Id.* 118.

THE THEORY OF ALCOHOLIC BEVERAGE TAXATION

It is commonly said that there are two principal aspects of alcoholic beverage taxation. These are its revenue and sumptuary aspects. The former is concerned with the yield alone of the tax. The latter involves the idea that the citizens' expenditures for certain types of goods deemed socially harmful should be limited by the government. Formerly the term sumptuary taxation was applied to those taxes laid on goods of a type not indispensable to human well-being and it comprehended, therefore, many taxes which today are called luxury taxes. The idea that too many luxuries, *per se*, are not good for the citizen has largely disappeared from present thought and our luxury taxes are based on the premise that a person who can afford to buy them can afford to pay the tax. Sumptuary taxation, therefore, is limited in meaning to taxation calculated to control and limit the consumption of goods from the use of which a real social harm is apprehended.[6]

The notion that the consumption of alcoholic beverages is something that should be regulated by the state is nothing new, and for that matter, neither is the strong resentment to this type of control which developed in the period immediately prior to the ratification of the Twenty-first Amendment. When our first whiskey tax was enacted in 1791, pamphleteers of the time sharply criticized and satirized the general theory of sumptuary taxation. One suggested that it would be wiser to tax the more prevalent vices of perjury, slander and infidelity.[7] Apropos of using the federal power to tax for this purpose the Chairman of the first National Revenue Commission of the United States, and later Special Commissioner of the Revenue, said:[8] "... where Congress assumes that the consumption or use of certain commodities is prejudicial to the interests of the people ... and attempts, when providing means for the support of the Federal administration, to embody such assumptions, with a view of prohibitions or restraints, in measures of revenue, it is also enacting sumptuary laws and imposing taxes, not in accordance with any rule of equity, but by reason of some arbitrary and sentimental notions of how a citizen ought to live, dress, eat and drink."

Aside from the questions of social evil and of the wisdom of using the tax power for its control or eradication, there has even been disagreement on what was formerly the principal inquiry, whether alcoholic beverages are of the "luxury" or "indulgence" type of commodities. As a matter of fact, in his *Lectures* and also in the first edition of his classic *Wealth of Nations,* Adam Smith seemed to class beer as a necessity, although in the fifth edition he says beer and ale in Great Britain and wine even in the wine countries are luxuries.[9] When Hamilton proposed the enactment of the first internal excises of the national government on the consumption of luxuries he

[6] TWENTIETH CENTURY FUND, *op. cit. supra* note 1, at 195.

[7] SHULTZ AND CAINE, *op. cit. supra* note 2, at 108.

[8] WELLS, THE THEORY AND PRACTICE OF TAXATION (1907) 256. See also TWENTIETH CENTURY FUND, *op. cit. supra* note 1, at 51.

[9] SMITH, LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS (Cannan ed. 1896); AN INQUIRY INTO THE NATURE AND CAUSE OF THE WEALTH OF NATIONS (Cannan ed. 1904) Bk. 5, c. 3, n. 73.

met with bitter opposition. The tax on whiskey, in particular, was attacked as a tax not on a luxury, but on a poor man's necessity. Whatever the merits of the case were, the tax itself was strongly resisted, especially in the rural and southern sections of the country and in spite of successive reductions in rate, President Washington was finally forced to send troops to western Pennsylvania to suppress what was known as the Whiskey Rebellion.[10]

In discussing the use of taxation to control or limit the consumption of alcoholic beverages, it may be pointed out that at the present time by far the greater part of both federal and state alcoholic beverage revenues are derived from excise taxes levied on a gallonage basis. Since this type of tax hits the lower income consumer much more effectively than the higher bracket man, it will have its strongest deterrent effect on the former class. Proponents of strict control through taxation would be quick to point out, in justification of such a tax, that it is among the members of the lower income brackets that the social problems of liquor are most acute.

While the ordinary general sales tax is termed regressive, the liquor excise results in pyramiding to a much greater extent. The federal tax on spirits is paid on withdrawal from storage and is added then to the production cost. When the consumer finally purchases the beverage this total cost, including the tax, has undergone several markups. The consumer pays a price which includes a profit on the amount of tax similar to the profit on any other ingredient or service which enters into the price of the finished article. The same is true, to a more limited extent, of the state excises. If the importing distributor or wholesaler stamps the bottle this tax, too, becomes a part of the price to the retailer and is included in the base on which he makes his mark-up.

Recommendations for Post-Repeal Taxation

It is true that pre-Repeal discussion, especially in 1930-32, placed great stress on the revenue possibilities inherent in the return of the alcoholic beverage traffic. That phase undoubtedly had great popular appeal in a period of declining tax revenues and mounting governmental deficits. But other persons were keenly aware of the social aspects of Repeal and of the tax policies which would become operative in the near future. The Liquor Study Committee began one inquiry. The resulting report known variously as the Fosdick-Scott Report after the members who conducted the study, and the Rockefeller Liquor Report after John D. Rockefeller, Jr., who initiated and arranged the financing of the study, made several recommendations regarding the taxation of alcoholic beverages.[11] Stated generally, the tenor of the report's tax recommendations was that "the fundamental motives should be broadly social, not narrowly fiscal."[12]

To the same effect was a resolution of the Interstate Commission on Conflicting Taxation adopted at Washington:[13] "It is the sense of the Commission . . . (1) that

[10] SHULTZ AND CAINE, *op. cit. supra* note 2, at 108, 110.

[11] FOSDICK AND SCOTT, TOWARD LIQUOR CONTROL (1933). [12] *Id.* 108.

[13] *Joint Hearings on Tax on Intoxicating Liquor before the House Committee on Ways and Means*

the social implications of the repeal of the Eighteenth Amendment greatly outweigh in importance the revenue aspects of repeal. (2) That the taxes on alcoholic liquors, as well as the taxes and license fees upon the traffic in such liquors, should be so devised as to promote temperance, and at the same time to discourage illicit trafficking in such beverages." The Commission was composed of state revenue officials and legislators and numbered among its members five well-known state revenue administrators of the present time.

Representatives of every type of interest testified at the joint hearings held in Washington by the House Committee on Ways and Means and the Senate Committee on Finance to consider the impending alcoholic beverage tax bill. As would be imagined, their recommendations as to objectives, rates and methods varied widely. Some of the federal officials stressed as objectives of the tax to be adopted, first the displacement of the bootlegger, and second, the matter of revenue.[14]

Among those who discussed the question of the social implications of the repeal of Prohibition and the taxation of alcoholic beverages to follow, there was agreement in principle on the fact that the chief control to be desired was that over distilled spirits or other beverages of high alcoholic content. Of this, the Fosdick-Scott Report said:[15] "The experience of every country supports the idea that light wines and beers do not constitute a serious social problem."

On the whole, the recommended tax policies looked to the high taxation of spirits and to a moderate rate of taxation on the lighter beverages on the theory that the consumption of the latter in preference to spirits would be promoted. Taxation of spirits and wine according to their alcoholic content was more than once suggested. It was also proposed to make the rate on fermented malt beverages vary as to alcoholic content. From the attitude of members of Congress to this proposal, however, it seems that they regarded fermented malt beverages generally similar within reasonable limits, and that a tax graduated in rather small percentages would create discriminations among members of the same industry.[16]

In one important particular the Fosdick-Scott Report, the Interstate Commission on Conflicting Taxation, and the Interdepartmental Committee (an informal committee of federal administrative officials reporting to the Secretary of the Treasury) made similar recommendations. This was in the matter of co-ordinating federal and state taxation of alcoholic beverages in order to prevent a duplication of taxes that would make it easier for the bootlegger to compete. The suggested system was for one gallonage tax, federally collected, to be shared between the Federal Government and the states. The Interdepartmental Committee suggested that 20% of the yield be returned to the states.[17] The Interstate Commission on Conflicting Taxation sug-

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and the Senate Committee on Finance, 73rd Cong. interim 1st and 2nd Sess. (1933) 244. Hereinafter cited as *Joint Hearings*.

[14] *Id.* 79, 157; and especially the Interdepartmental Report to the Secretary of the Treasury, 308-309, 331.

[15] FOSDICK AND SCOTT, *op. cit. supra* note 11, at 18.

[16] *E.g., Joint Hearings*, 160.

[17] *Id.* 338.

gested the amount returned be 50%.[18] The personnel of the Fosdick-Scott study commission felt that not less than 20% of the yield should be returned.[19] The formulas by which the distribution among the states would be made differed in one principal respect, for the Interdepartmental formula would have included a production factor in addition to the wet-dry area basis.[20]

In addition to the fiscal-sumptuary aspects of the taxation of alcoholic beverages, there was the complicating factor of the bootlegger to be considered. During the years in which the country had Prohibition, the illicit liquor trade had grown to tremendous proportions. Many witnesses at the Congressional hearings spoke of its compact organization, its ability to produce liquor on a fairly low cost basis and the difficulty of competing with the illegal trade if legal liquor could not be sold at a fairly low price. This factor, therefore, was also an important consideration in the tax rate deliberations.

THE PRESENT AND PRE-PROHIBITION TAXATION OF ALCOHOLIC BEVERAGES

The proposals that the Federal Government impose only excise taxes, that the states impose only occupational license taxes, and that localities levy no taxes, urged at various times by students of post-Repeal taxation, did not become effective. Under the form that alcoholic beverage taxation has actually taken, we find the three levels of government taxing either the beverage or the trade or both.

The Federal Government imposes an excise tax on distilled spirits, wines, and beers. Imported spirits, wines and beers pay in addition a customs duty. There are numerous special or occupational taxes on rectifiers, brewers, and wholesale and retail dealers in all types of alcoholic beverages. The states impose excise taxes on gallonage of all types of alcoholic beverages and also collect miscellaneous license fees. Local governments, counties, cities, towns and villages are often empowered to license the sale of alcoholic beverages and in some instances to lay an excise measured by gallonage.

(a) *Federal Taxes*. The excise tax is the backbone of the federal system of alcoholic beverage taxation. In 1939 these taxes accounted for $523,458,285 out of a total liquor tax revenue of $587,799,700.[21] From Repeal until June 30, 1938, the excise on distilled spirits was $2.00 per taxable gallon. Effective that date, it was raised to $2.25 except on brandy which remained at $2.00. Then, effective July 1, 1940, the rate on all distilled spirits was raised to $3.00 and brandy was increased to $2.75 per gallon. The increase of 75c, effective for five years only, was imposed in the Revenue Act of 1940[22] to help defray the additional expenditures authorized for the national defense. In addition to the excises, there is also a rectification tax of 30c per gallon.

The present rate of tax on distilled spirits is nearly three times the ordinary pre-Prohibition rate of $1.10. However, it is not quite half as great as our highest previous rate of $6.40 per taxable gallon of beverage alcohol. This rate, imposed

[18] *Id.* 244.
[19] *Id.* 151-155.
[20] *Id.* 244, 338, 346.
[21] REP. COMMISSIONER INT. REV. (1939) 97.
[22] Pub. L. No. 656, 76th Cong., 3rd Sess. (1939).

by the Revenue Act of 1918, passed in February 1919, was really a penalty, because, although the Eighteenth Amendment was not effective until January 16, 1920, thirty-two states were dry and there was practical prohibition under Presidential proclamation. The next highest tax of $3.20 on beverage spirits was in the period immediately preceding, from October 3, 1917, to February 25, 1919.[23]

Wine taxes are comparatively inconsequential as revenue producers. The rates on wine as of June 30, 1940, ranged from 5 to 20c per gallon on still wines and from 1¼ to 2½c per half pint (20 to 40c per gallon) on cordials and artificially carbonated and sparkling wines. These rates are close to those imposed before Prohibition. The first rates on wine after Repeal, however, were considerably higher, ranging from 10 to 40c on still wines. These original rates were reduced 50% in 1936.

Such a reduction seemed to indicate a policy of encouraging the use of lighter alcoholic beverages, since, because of its bulk and low alcoholic content, there is no great inducement for bootleggers to traffic in wine. For the latter reason, taxes on it may be laid with an eye to revenue primarily. In spite of the appeal of this interpretation of policy, it is questionable, for wine received two boosts in the applicable tax rate effective July 1, 1940, the first raising the 10c bracket to 15c and the 20c bracket to 25c.[24] Then the Revenue Act of 1940 increased all wine taxes, resulting in a present range of rates from 6 to 30c per gallon on still wines and of from 1½ to 3c per half pint (24 to 48c per gallon) on cordials and artificially carbonated and sparkling wines.

Prior to 1914 wine produced from domestic grapes was not taxed. In that year a tax of 8c per gallon was imposed on all domestic and imported still wines.[25] In 1916 the tax was revised according to the alcoholic content of the wines, and those of not more than 14% alcoholic content paid 4c per gallon. In 1919 these rates were greatly increased. Wines over 24% are now taxed as distilled spirits. They are the only example in the federal system where a distinction based on alcoholic content is made in the rate of tax.

The federal excise on beer from Repeal to July of this year was $5.00 per barrel of 31 gallons. Under the Revenue Act of 1940 it was increased $1.00 for the next five years. The present rate of $6.00 is six times as high as the ordinary pre-Prohibition tax of $1.00 per barrel which was in effect from 1902-1914. From 1914-1917 the rate was $1.50 and in the 1917-1918 period it was increased to $3.00 and on February 1919 to $6.00. This latter increase, however, was in the interim before the effective date of the Eighteenth Amendment.

In addition to the internal excises on spirits, wine and beer import duties are also collected by the Federal Government. Imported products are subject to both the duties and the excises. Prior to October 4, 1917, the internal excises were not applied to such imports. The duty on spirits was $2.60 per proof gallon, on still wines under 14%, 45c per gallon, over 14%, 60c per gallon, and on beer, 23 to 45c per

[23] See table of statutory citations, *Joint Hearings*, 372.
[24] Pub. L. No. 655, 76th Cong., 3rd Sess. (1939). [25] 38 Stat. 746.

gallon depending on the type of container. In October 1917 spirits were first subjected to the double impost. The present duty on spirits is $5.00 per gallon but numerous trade agreements have resulted in reductions, and the same is true of the wine duties. Fermented malt beverages pay $1.00 per gallon duty plus the excise of 16c per gallon.

(b) *State and Local Taxes.* The Twenty-first Amendment as construed by the Supreme Court returned the regulation of liquor traffic to the states. Under this construction the power of the states to tax the alcoholic beverage traffic was considerably widened for the restrictions of the commerce clause no longer bound them.[26] As a matter of practice, however, practically all states exempt shipments delivered outside of the state from their excise taxes. As far as the states' power to impose excises on local sales of liquor was concerned, the Amendment caused no changes since the states always had this power unless their own constitutions prohibited it.

All of the license-control states now impose excise taxes on spirits, wine and beer just as the Federal Government does. All of the monopoly states impose excises on beer, and Michigan, Ohio, Oregon, Pennsylvania, Vermont, Washington and Wyoming have in addition an excise on wine. Seven of the monopoly states, Maine, Montana, Ohio, Pennsylvania, Vermont, Washington and Wyoming, have special sales or excise taxes on distilled spirits sold by state stores or agencies.[27] Effective July 1, 1940, Virginia added a 10% tax on sales by the Beverage Control Board.

The rate of tax on distilled spirits ranges from 40c per gallon in Nevada and 50c in Illinois to $1.60 in Colorado, $2.00 in Delaware, New Mexico and Vermont, and $2.20 in Maine. In Rhode Island the excise on imported distilled spirits is $1.00 per gallon but on domestic spirits the rate is among the lowest, 50c. Massachusetts until a year ago had a 40c tax but it has been increased to 95c for a period of two years ending in 1941.[28]

The rate of excise on wine ranges from a low of one cent per gallon in California and five cents in Arkansas to a high of 75c in Florida, 80c in Arizona and $1.00 in Minnesota. Vermont has a state store tax on fortified wine which amounts to $1.00 per gallon. In some states the tax on wine is equal to the tax on distilled spirits. This is similar to federal law under which wines containing over 24% alcohol by volume are taxed as distilled spirits. In some states the rates are moderate and there is little range in them. For example, in Illinois the rates on wine are from 10 to 20c. In the District of Columbia there is no tax on still wines of under 14% alcohol.

The excise on beer likewise shows great variations ranging from 2c per gallon (62c per 31 gallon barrel) in California, Illinois, Missouri, Nevada and Wyoming to

[26] State Board of Equalization v. Young's Market, 299 U. S. 56 (1936). See also Indiana Brewing Co. v. Liquor Control Comm., 305 U. S. 391 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U. S. 395 (1939).

[27] No consideration is given in this paper to revenues of the monopoly states except in so far as they impose taxes on the alcoholic beverage traffic. Most of these states, however, derive their principal alcoholic beverage revenues from sales mark-ups.

[28] State tax rates taken from the statistical summaries of the Distilled Spirits Institute, *Public Revenues from Alcoholic Beverages*, 1937, 1938, 1939.

$6.61 per barrel in Mississippi where the tax is laid at the rate of 21.34c per gallon. Several other states have high taxes on beer, including Maine, 16c per gallon or $4.96 per barrel; Georgia, $4.50 per barrel, and North Carolina, $3.75 per barrel. South Carolina taxes beer at 15c per gallon or $4.65 per barrel, and, when it is sold in quantities of 6 ounces or under, at the rate of 1c for six ounces or $6.61 per gallon.

These excises on spirits, wine and beer are a post-Repeal development in state taxation. Before Prohibition the states had only occupational taxes on this traffic and left the excise taxation to the Federal Government. Pressure for revenue coupled with the little headway made on the federally-collected state-shared tax proposals soon made it evident that the states would not return to their pre-Prohibition system of taxation.

Shortly after Repeal proposals were made for special income taxes on the alcoholic beverage industry. This was advocated from the viewpoint of social control on the theory that such a tax would act as a brake on an aggressive sales policy by weakening the profit motive.[29] Apparently no state has enacted such a tax.

Several states, however, do impose special sales taxes in addition to the regular excises. These are: Arkansas, which levies a special tax of 3% on the wholesale price of spirituous and vinous liquors; North Dakota, a tax of 7% of the sale price on alcoholic beverages of 4 to 24% alcohol and 8% on beverages of 24 to 50% alcohol; and South Dakota, a special tax of 10% of the gross receipts of distillers, manufacturers and wholesalers from sales of intoxicating liquor and high point beer. Fifteen states having general sales taxes also require that this tax be collected on sales of alcoholic beverages. Six of these are monopoly system states. In addition to these states, New York City also collects its retail sales tax on sales of alcoholic beverages. A new law in Virginia is worthy of note in that it includes a tax differential on beer sold at a price over ten cents. It provides that where beer is sold in bottles of 12 ounces or less the tax is 1c if the price is 10c or under but if sold for more than 10c the tax is 50% higher or 1½c.[30]

Localities in a few instances also have the power to impose excises. New Orleans, in addition to local license fees, collects a tax of 40c per gallon on distilled spirits, 5 to 40c on wines and 40c per barrel on beer. Garrett County, Maryland, has a tax of 2c per pint bottle of beer. Incorporated cities and towns in Arizona are apparently empowered to license and tax the manufacture, sale and disposal of alcoholic beverages, while in Utah, counties and incorporated cities and towns may license and tax the sale of light beer at retail.

Forty-seven states have license fees of some type. Rhode Island collects license fees but the money collected goes to the city or town where the licensed premises are located. The licenses issued by the states include some or all of the following: distillers, rectifiers, blenders, winers, brewers, beer, wine and spirits wholesalers and retailers, package stories, hotels, night clubs, caterers, restaurants, drug stores, clubs,

[29] *Joint Hearings*, 161; FOSDICK AND SCOTT, *op. cit. supra* note 11, at 124.
[30] Laws 1940, H. B. 142.

warehouses, still manufacturers, brokers, nonresident manufacturers, common carriers and others. In *Public Revenues from Alcoholic Beverages, 1939*,[31] the number of different state license fees for which revenue receipts are given range from 21 in California, 20 in Missouri and Oregon, and 18 in Michigan, New York and Pennsylvania, to 5 in Idaho, Nebraska, South Carolina and West Virginia and 3 in Utah and Kansas. These license fees vary greatly in cost, from a low of $1.00 on domestic wine manufacturers in Arkansas to a high of $7,500 on distillers in New York.

Fixing the license fees for various types of sellers has been suggested as a method of controlling the traffic in alcoholic beverages. One study in which this point is examined says, however, that in most of the states no definite aim is revealed in the imposition of the license fee.[32]

TAXATION AND THE CONSUMPTION OF ALCOHOLIC BEVERAGES

The excise yields on various alcoholic beverages afford one means of calculating their consumption. During the calendar years 1937, 1938 and 1939 all of the states, monopoly and license, derived revenues from alcoholic beverage taxes. On the basis of these revenues the consumption of alcoholic beverages dipped as did other lines of consumers goods in the recession of 1938.

These revenues declined $12,000,000 in 1938 and came back $17,000,000 in 1939. License fee revenues increased in 1938 but dropped sharply in 1939, probably reflecting a lesser number of renewals following a year of decreased sales. State monopoly sales declined $16,000,000 in 1938 but recovered only $12,000,000 in 1939. Net state revenues of all kinds from alcoholic beverages declined $17,000,000 in 1938 and in 1939 gained slightly more than that amount.[33] This 1938 figure represents a decline of about 6% as compared with a drop of about 10% in the national income during that year.[34]

The same trend is noticeable in total federal internal revenue and import duty yields which declined about $32,000,000 in 1938 and increased $35,000,000 in 1939.[35] It is notable, however, that excise yields on distilled spirits increased in each of these calendar years. This was due to the 25c per gallon increase in tax which was effective July 1, 1938. On a fiscal year basis, federal yields on distilled spirits followed the state revenue pattern, declining $10,000,000 in 1938 from the 1937 figure.[36]

During this period, on the basis of calendar year federal figures, wine tax yields were increasing, being slightly more in 1938 than in 1937, and about 14.5% higher in 1939 than in 1938.

In this same period federal beer taxes were about $750,000 less in 1939 than in 1937, having dropped $22,000,000 in 1938 under the 1937 figures.

[31] *Supra* note 28.

[32] HARRISON AND LAINE, AFTER REPEAL (1936) 193. See also NAT. CONF. OF STATE LIQUOR ADMINISTRATORS, PROCEEDINGS (1938) 93, *id.* (1939) 109-117.

[33] Distilled Spirits Institute, *supra* note 28.

[34] U. S. Dept. of Commerce, *Survey of Current Business* (June 1940) 7.

[35] As calculated on calendar year basis by Distilled Spirits Institute, *supra* note 28.

[36] REP. COMMISSIONER INT. REV. (1937-1938, 1939).

On the face of these revenue figures, it does not appear that the present taxation of alcoholic beverages, taking the Federal Government and the states as a whole, is operating in the direction of increasing the consumption of the lighter alcoholic beverages at the expense of the heavier. Federal figures give, of course, an indication of the overall picture of alcoholic beverage consumption since all these beverages sold in the states are federal taxpaid.

TABLE I. U. S. TAXPAID WITHDRAWALS[87]

	Still Wine	*Distilled Spirits*	*Fermented Malt Beverages*
1935	35,417	58,083	42,228
1936	47,474	76,330	48,759
1937	62,035	87,721	55,391
1938	61,175	85,949	53,926
1939	67,376	92,427	51,816

Analysis of taxpaid withdrawals indicates this more clearly. In 1936 the tax on still wines was reduced 50%. In the following fiscal year, taxpaid withdrawals of still wines increased 14,500,000 gallons or 31%. Considering the reduction in tax, the gain becomes less remarkable, since in the fiscal year 1936 similar withdrawals had been 12,057,892 gallons or 33% higher than in 1935.

If the increase in wine withdrawals were the sole test of the overall wine-taxing program from the viewpoint of promoting the consumption of lighter beverages it would appear successful, since from 1935 to 1939 the increase in taxpaid withdrawals of wine amounted to 31,959,000 gallons or 90%. But this gain was not at the expense of spirits, for in the same period withdrawals of spirits increased 34,344,000 gallons. In absolute figures, this is larger than the increase in wine withdrawals, though in terms of percentage increase, 59%, it is less. Moreover, during the same period, beer withdrawals increased but 9,558,000 barrels, and as a matter of fact, declined in 1938 and 1939 from a previous higher point in 1937. These relationships in relative withdrawals exist in spite of the fact that the beer tax until July 1, 1940, remained at $5.00, the still wine tax had been reduced 50% in 1936 and the spirits tax increased 12½% in 1938.

Although the statistics of withdrawals and, inferentially, consumption of spirits, wine and beer do not indicate any swing to the lighter beverages, a comparison of present and pre-Prohibition figures shows a decline in per capita consumption of both spirits and beer. (See Table II.)

The decrease in the consumption of spirits and beer in the period since 1900 is accentuated by the fact that in 1900 and 1905 there were three, in 1910 six, and in 1915 eight dry states. Today there are no totally dry states, and only three, Kansas, Mississippi and Oklahoma, prohibit the sale of alcoholic beverages other than those of very light alcoholic content. Wine consumption is higher now than in any of these years except 1910. The sharp drop in 1915 is due no doubt to the fact that

[87] Compiled from the Annual Reports of the Commissioner of Internal Revenue. Wines and spirits in thousands of gallons; fermented malt beverages in thousands of barrels.

TABLE II. PER CAPITA CONSUMPTION OF ALCOHOLIC BEVERAGES[38]
(in gallons)

	Distilled Spirits	Wine	Beer
1900	1.26	.40	16.05
1905	1.42	.42	18.27
1910	1.44	.66	20.03
1915	1.28	.33	18.68
1939	.94	.585	12.27

prior to 1914 wine bore no excise tax. At the present time it is the only one of the three beverages which has climbed back to around its average pre-Prohibition consumption. In view of this period-to-period comparison of consumption statistics, it appears that the combined federal-state alcoholic beverage tax programs on an overall basis, has not been ineffectual from the standpoint of those who recommended that "fundamental motives . . . be broadly social, not narrowly fiscal."

Whether the recent increases in rates under the Revenue Act of 1940 will cause any change in present trends is problematic. As among the three classes of alcoholic beverages, a change, if any, should favor the consumption of the lighter beverages because of the differentials in the increases, which are as follows: beer, 20% increase; spirits, 33⅓%; and wine, 20 to 50%. However, it has been pointed out that in the 1935-1939 period, withdrawals of spirits increased more than wine, in spite of the fact that the former bore an increase in tax rate while wines were favored by a reduction.

In the report of the Secretary of the Treasury for the fiscal year 1939, printed before the increased rates were imposed by the Revenue Act of 1940, it was estimated that alcoholic beverage taxes would yield $615,500,000 in the fiscal year 1940. Of this increase, it was estimated spirits would furnish $18,000,000, beer $15,000,000 and wines $1,000,000, while floor taxes of $5,000,000 would not recur.[39] Actual receipts from alcoholic beverages taxes in the fiscal year 1940 were $624,000,000. But most significant is the fact that distilled spirits excises increased $31,000,000 as compared with the estimate of $18,000,000, while beer excises increased only $4,800,000 against an estimated increase of $15,000,000.[40]

These figures seem to furnish another indication that although the combined federal-state tax program has limited alcoholic beverage consumption on the basis of pre- and post-Prohibition comparisons, yet as between the various classes of alcoholic beverages, the rates are not such that the consumption of the lighter beverages is encouraged and favored.

TAXATION AND THE ENFORCEMENT OF ALCOHOLIC BEVERAGE LAWS

In determining its alcoholic beverage tax program one of the principal considerations facing Congress was that of setting the tax rate at such a point that the

[38] 1900-1915, *Joint Hearings* 386; 1939, spirits and beer calculated on basis of excise taxes (beer imports in 1939 not included; wine figure from Wine Institute, *Consumption of Wine by States* (1939).

[39] REP. SEC. TREAS. (1939) 404.

[40] Bur. of Int. Rev., Press Release, No. 138, Aug. 30, 1940.

price to consumers would be low enough to discourage bootleg competition. As was to be expected, there were various opinions concerning the price at which the illicit goods could be marketed to retailers. These estimates ranged from $1.00 to $4.20 per gallon.[41] The states were faced with a similar problem. After the federal rates were determined, and since all the license states subsequently imposed their own taxes on spirits, observers watched with interest the ensuing effort to oust the bootleg trade which gained such a foothold during Prohibition days.

TABLE III. FEDERAL ENFORCEMENT STATISTICS,[42] 1935-1939

	Seizures			Arrests
	Stills	*Spirits*	*Mash*	
1935	15,712	863,375	21,373,107	31,625
1936	15,629	730,646	14,671,146	31,504
1937	16,142	476,521	12,365,224	29,477
1938	11,407	344,668	7,553,848	25,867
1939	12,059	336,268	8,076,461	28,884

The table shows the seizures and arrests made for violations of federal alcoholic beverage laws by the Alcohol Tax Unit of the Bureau of Internal Revenue from July 1, 1934 to June 30, 1939. The drop in seizures of stills and presumably in the scale of violation has been especially marked since 1937. The amount of distilled spirits seized has steadily decreased year by year, and seizures of mash dropped in every year but one. The absence of relative decreases in the number of arrests might be an indication that bootlegging tended to become a field of comparatively small scale operations. There is no data in the Commissioner's report as to the number of arrests connected with the manufacture or sale of illicit liquor, but some other types of federal law violations make up part of the total arrests.

The drop in seizures since 1937 is especially interesting in view of the opinion expressed at the Congressional hearings held in December 1933 that it would take about three years to eliminate organized bootlegging.[43] Since there has been no letdown in enforcement, the inference is that bootlegging on a large scale has been brought under control.

The developments in 1939 further substantiate this. After reaching a low point in 1938, seizures of stills increased in 1939. On the surface this rise might appear to be related to the increase in the tax on spirits from $2.00 to $2.25 per gallon. The Commissioner of Internal Revenue, however, in commenting on the point,[44] attributed the increase to a shift of enforcement efforts to areas "where the typical violator operates on a small scale." In other words, the investigational personnel during this period was augmented and the increase in seizures represents better en-

[41] *Joint Hearings*, 35, 127, 139, 255.
[42] Compiled from Annual Reports of the Commissioner of Internal Revenue. Spirits and mash in gallons.
[43] *Joint Hearings*, 42.
[44] REP. (1939) 31.

forcement in that area rather than an increase in violations in the country as a whole.[45]

In view of the fact that the combined 1939 federal-state excises on spirits ran as high as $4.25 per gallon (Delaware, New Mexico, Vermont) and $4.45 per gallon (Maine), this record of enforcement seems impressive. It should be recalled, in this connection, that at the Congressional hearings in 1933 there was quite general agreement that a combined federal-state excise of around $2.60 per gallon was the highest that could be safely imposed if the illicit trade was to be brought under control.[46]

Some, and perhaps a great part of the stringency of this enforcement is due to the control under the act of June 18, 1934,[47] which the federal authorities exercise over the materials commonly used in the illicit production of distilled spirits. The Commissioner of Internal Revenue credits a number of seizures to information obtained from distributors of such raw materials.[48] Thus, even though higher excises are in effect than before Prohibition, the development of new techniques of administrative enforcement has resulted both in apparently successful control of the organized illicit traffic and maintenance of the public revenue. The tremendous strides that have been made in enforcement procedure are best illustrated by a comparison with the 1862-1870 period. In 1865 the spirits tax was increased to $2.00 from a low of 20c in the first part of the previous year. In the fiscal year 1864 the yield was $30,000,000, but in 1865 it dropped to less than $19,000,000.[49] Part of this decline may be attributed to the fact that no floor tax was imposed and production was quickened before the new rates went into effect. But one student of this problem comments on the fact that the number of distilleries in the country increased "just in proportion as the tax on spirits was augmented," their operators undoubtedly tempted by the profits in illicit distilling under a $2.00 tax.[50]

An indication of the difficulty tying the tax rate on spirits to control of the illicit traffic is afforded by Table IV relating state tax increases and enforcement statistics.

In each of the six states mentioned there were increases ranging from 41c to 65c per gallon. Yet seizures of stills by federal authorities and arrests for violations of federal liquor laws show 16 declines as against 7 increases.

In spite of enforcement statistics, however, opinion is by no means in agreement as to the success of the campaign against the illicit trade. One study estimated that in 1935 bootleg production reached 40,000,000 gallons or about half the amount of distilled spirits withdrawn tax paid. Raw materials may be bootlegged, the study points out, or higher priced materials not so likely to be checked under the Government's raw material control program may be substituted.[51] State officials, while

[45] REP. SEC. TREAS. (1939) 154.

[46] *Joint Hearings*, 36, 153 *et passim*.

[47] 48 STAT. 1020, 26 U. S. C. §1222.

[48] REP. (1939) 31; (1938) 36. See also REP. (1937) 32; (1936) 32; (1935) 28.

[49] SHULTZ AND CAINE, *op. cit. supra* note 2, at 307-308.

[50] WELLS, *op. cit. supra* note 8, at 46.

[51] HARRISON AND LAINE, *op cit. supra* note 32, at 201 *et seq*.

TABLE IV. TAX RATES AND ENFORCEMENT STATISTICS[52]—SELECTED STATES

State	Fiscal Year	State and Federal Tax	Stills Seized	Arrests
Florida	1937	\$2.80–\$3.20[1]	739	889
	1938	\$3.20	650	1,402
	1939	\$3.45[2]	638	1,429
Georgia	1937	Not legal	1,530	2,683
	1938	\$3.00[3]	1,145	2,339
	1939	\$3.25[2]	1,438	3,328
Louisiana	1937	\$2.60	254	373
	1938	\$3.00	121	236
	1939	\$3.25[2]	71	166
Nebraska	1937	\$2.50	30	90
	1938	\$2.80[4]	15	66
	1939	\$3.05[2]	4	59
South Carolina	1937	\$2.80	649	991
	1938	\$2.96[5]	675	970
	1939	\$3.21[2]	674	1,048
South Dakota	1937	\$2.50	14	27
	1938	\$2.75[6]	4	17
	1939	\$3.00[2]	6	17

[1] State tax 80c to June 1937; \$1.20 after that date.
[2] Federal tax \$2.225 effective July 1, 1938; prior rate \$2.00.
[3] Sale legalized effective Feb. 1938; state tax \$1.00.
[4] State tax 50c to April 1937; 80c after that date.
[5] State tax 80c to May 1937; 96c after that date.
[6] State tax 50c to July 1937; 75c after that date. In addition, effective July 1937, distillers and wholesalers were required to pay a tax of 10% of their gross receipts.

acknowledging the manner in which the federal officials work with them in enforcement problems[53] have admitted the danger of the bootlegger and stressed the importance of lower federal and state taxes in removing the incentive behind the continuance of the illicit trade.[54]

The estimate of the illegal production of 40,000,000 gallons of spirits in 1935 is only about one third less than the Bureau of Prohibition's estimate for 1930 which was 60,000,000 gallons. The total quantity in circulation from all sources, including imports from other countries, was then estimated to be about 70,000,000 gallons.[55] In that period, however, there were seizures of 16,180 distilleries, 8,138 stills, 4,152,920 gallons of malt liquor, and 34,183,427 gallons of mash.[56] On the basis of the number of seizures made at the present time (Table III) the estimate of illicit production of 40 million gallons seems out of line when compared to the 1930 figure which, by

[52] Compiled from *Public Revenues from Alcoholic Beverages*, *supra* note 28, and the Annual Reports of the Commissioner of Internal Revenue for 1937-1939.
[53] NAT. CONF. STATE LIQUOR ADMINISTRATORS, PROCEEDINGS (1937) 55-57.
[54] *Id.* (1938) 191, (1939) 123.
[55] Nat. Comm. on Law Obs. and Enf., *supra* note 1, at 142.
[56] *Ibid.*

the way, was about half the pre-Prohibition consumption. Taking together the trend of seizures, the raw materials control program and the continued rise in revenue receipts, it seems reasonable to conclude that even at these rates there is effective enforcement.

The states have a peculiar bootleg problem of their own which occurs because of the differences in rates of tax among the states and because liquors sold for shipment to other states are generally exempt from the excise tax. Thus, where adjacent states have tax rates with a sufficient differential, there will be attempts to buy liquor in the lower tax states for transportation into the others.[57] Or, it may happen that alcoholic beverages may be purchased taxfree in one state and brought to another for illicit sale. To overcome this, the states have adopted the practice of reporting out-of-state shipments to the state of consignment in order that the officials of the latter state may check to see whether the proper tax has been paid.[58]

Whether the legal liquor traffic can hold its own despite the fairly heavy increases in tax in some of the states[59] during 1939, plus the one third federal increase in 1940, is another problematic situation. As a matter of fact, most of these state-enumerated increases were in effect during part of the fiscal year 1938-1939, and in that period federal receipts from alcoholic beverage taxes exceeded Treasury estimates by $2,000,000, the revenue from the distilled spirits excise alone exceeding estimates by $20,000,000.[60] This was true, moreover, in spite of the fact that the federal rate increased 25c in that year. But there is little doubt that with a combined tax rate on spirits of around $5.00 in some states, a stronger incentive to illicit dealers will be furnished.

ALCOHOLIC BEVERAGE TAXATION AND PUBLIC FINANCE

The taxation of the alcoholic beverage traffic has played an important role in the revenue system at various periods in our national policy. Indeed, a consideration of the occasions on which the Federal Government enacted taxes of this type indicate that the raising of revenue was the predominant if not the sole motivating factor in pre-Prohibition times.

The first national internal tax on alcoholic beverages was enacted in 1791 in order to furnish revenues for the program of expenditures pledged by the Federalists in 1789, for which the customs duties were seen to be insufficient.[61] This was a tax on whiskey graduated as to proof and with a differential favoring the use of domestic raw materials. The rates on low proof spirits were 9c and 11c respectively for whiskies distilled from domestic and imported materials.

[57] See discussion, NAT. CONF. STATE LIQUOR ADMINISTRATORS, PROCEEDINGS (1938) 162, and *supra* p. 704.

[58] *Id.* 166-170. In addition the states sometimes find that federal tax-paid liquor is sold without payment of the state tax. To the states, of course, this is just as much bootlegging as is the sale of spirits produced in illicit stills. To what extent this practice is carried on, however, it is not possible to say.

[59] Ark., 80c to $1.12; Conn., 60c to $1.00; Md., $1.00 to $1.15; Mass., 40c to 95c for 2 years; N. C., gross sales tax raised from 7% to 8½%; N. D., additional transactions tax of 7-8%; R. I., 75c to $1.00; S. C., 96c to $1.28; and Vt., 23c to 35c per pint. Distilled Spirits Institute, *supra* note 28.

[60] REP. SEC. TREAS. (1938) 456; (1939) 404.

[61] SHULTZ AND CAINE, *op. cit. supra* note 2, at 107-108.

Discontinued in 1802 together with the other internal excises, it was not until the War of 1812 that the tax was again imposed. Then increased expenditures, coupled with a drop in customs receipts, made necessary new internal taxation. A special session of Congress in 1813 enacted license taxes on stills and on the retailing of wines and spiritous liquors.[62] In effect only a few years at this time, alcoholic beverage taxes were not used again until 1862 when other war demands were felt. From a 20c per gallon rate on spirits in 1862 there were successive increases to $2.00 per gallon in 1865.[63] In 1868 the rate was cut to 50c but the tax by then had assumed a permanent place in the federal revenue system. Shortly before the turn of the century, the rate had climbed to $1.10, the total alcoholic beverage tax yield increasing from $51,000,000 in 1869 to $230,000,000 in 1913. In the next year, 1914, a tax was imposed on domestic wines which with other excises was to replace the loss of receipts caused by the outbreak of the World War. Then in the Revenue Act of 1917 taxes on alcoholic beverages were raised to yield an estimated $200,000,000 additional.

In all these instances, there seems little doubt that the primary objective of the tax was to raise needed revenues. The rate of $6.40 imposed under the Revenue Act of 1918 (enacted in February 1919) in distilled spirits withdrawn for beverage purposes is probably the only exception since it was effective in the interim between the ratification and the effective date of the Eighteenth Amendment. It is paradoxical that under this high rate which has been called a penalty tax, receipts from the spirits tax were the highest ever recorded, $354,000,000, even though the number of gallons domestically consumed shrank to 84 million from a total of 167 million gallons two years previously in 1917.[64] With this situation may be compared that existing in 1864-65 when after a sharp increase in rate to $2.00 per gallon receipts dropped from $30,000,000 in 1864 to $19,000,000 in 1865.[65] As has been observed, part of this decrease may be attributed to the fact that the tax was imposed on new production only and not also on floor stocks as is the case today. As a result, production was stepped up when a rate increase was believed probable and manufacturers were able to make an additional profit, for, although they did not pay the government the increased tax, they did add it to the price when they released their stocks for sale to consumers.[66]

(a) *Federal and State Revenues.* After the repeal of Prohibition alcoholic beverage taxes again were called upon to produce revenue. Although it has been pointed out that this was by no means the only element considered, there can be no doubt that the tax has been a successful revenue raiser. In the fiscal year 1939 the yield to the Federal Government was $587,000,000 and to the states $219,000,000. The disappointing yields in the first years following Repeal were due no doubt to the facts: first, that the consumption of alcoholic beverages has not, even at the present time, reached its pre-Prohibition levels and the estimates were based on an annual con-

[62] *Id.* 141. [63] *Id.* 307. [64] *Joint Hearings,* 326, chart I.
[65] SHULTZ AND CAINE, *op. cit. supra* note 2, at 307. See also WELLS, *op. cit. supra* note 8.
[66] *Id.* 43.

sumption of around 140,000,000 gallons of distilled spirits yearly which was equivalent to the pre-Prohibition taxpaid withdrawals; and second, that all states did not immediately legalize the sale of liquor.

TABLE V. ALCOHOLIC BEVERAGE TAX COLLECTIONS[67]
(in millions of dollars)

	Federal		*State*	
Year	*Alcoholic Beverages*	*Percent of Total Tax Collections*	*Alcoholic Beverages*	*Percent of Total Tax Collections*
1915	224	35.	21	5.6
1919	483	12.	14	2.6
1937	594	12.3	218.	7.2
1939	587	12.3	218.5	7.2

The table shows the federal and state yields in dollars and in percentages of total tax revenues for selected pre- and post-Prohibition years. It is worthy of note that although both federal and state yields are larger in absolute amounts than in pre-Prohibition days, the Federal Government now receives only about one eighth of its total tax revenues from this source as against one third; whereas these taxes contribute a slightly higher percentage of the total tax revenues of the states.[68] In 1939 federal alcoholic beverages tax revenues were about two and a half times greater than in 1915, while in the same period state revenues from this source increased ten-fold.

(b) *Local Revenues.* Accurate comparisons of pre- and post-Prohibition local revenues from alcoholic beverage taxes are difficult to make. In 1902, localities received approximately $45,000,000 from liquor licenses and in 1912 approximately $58,000,000.[69] Subsequent to 1912, revenues of this type were included in the category of business license taxes but were not broken down by type of business. It has been estimated that the advent of Prohibition cost the states and localities about $100,000,000 annually.[70] On the basis of state collections of $20,000,0000 in 1915, the local collections would have been $80,000,000, an increase of $22,000,000 in the three years following 1912. Perhaps the actual figure is somewhere between the two.

It is likewise quite difficult to make an appraisal of the relative importance of these tax revenues to local governments at the present time. In the chart "America's Taxes,"[71] based on United States Treasury data, it is estimated that local governments in 1938 collected around $25,000,000 from alcoholic beverages taxes, although this has been regarded as a low estimate. On the basis of estimated total local tax

[67] Compiled from Annual Reports of the Secretary of the Treasury, *Financial Statistics of States 1937* (U. S. Bur. of Census), and *State and Local Government Special Study No. 7* (U. S. Bur. of Census). Total tax collections are exclusive of payroll taxes.

[68] See Tax Administrators News, April 1940, for a graphic comparison of federal tax collections by sources; Feb. 1940, for a graph of the tax dollar of the states for 1939; Aug. 1940, for a graphic comparison of trends in U. S. taxes, federal, state and local by type of tax.

[69] 2 WEALTH, DEBT AND TAXATION (U. S. Bur. of Census, 1913) 462.

[70] SHULTZ AND CAINE, *op. cit. supra* note 2, at 542.

[71] Tax Administrators News, Sept. 1939.

receipts for 1938 of $4,531,000,000,[72] this would constitute only slightly more than one half of one percent.

The Distilled Spirits Institute has published estimates[73] for 1937-1939 local collections. These are somewhat higher in amount and for these years are as follows: 1937, $33,574,638; 1938, $31,772,279; 1939, $32,835,899.

(c) *Sharing of Taxes.* The localities, however, besides their direct tax receipts also share in some states in the yields from state taxes on alcoholic beverage sales or licensing. Here again it is not possible to secure completely segregated figures. The Bureau of the Census reports a total of approximately $44,000,000 of alcoholic beverage sales and license taxes shared by 18 states during 1937.[74] This does not include any profits from state monopoly systems. Another study reports that 22 states in 1938 shared approximately $59,000,000 with local governments but this amount apparently includes some monopoly system profits.[75]

The basis of sharing such taxes is, roughly speaking, generally in proportion to the amounts of revenue derived from the particular locality. This may be stated on a population basis, as a wet and dry ratio, in terms of the number of licenses issued and the receipts therefrom, or sometimes simply in proportion to the localities whence the revenue is derived. In one state, Oklahoma, the apportionment is made on the basis of scholastic enumeration.[76]

The estimated present direct tax collections of the localities plus their shares of state collected taxes brings the total close to the top estimate of $80,000,000 annually received before Prohibition. In order to round out the local picture, however, another development must be taken into consideration.

In 1919 the states sought adjustments for the loss of revenue that Prohibition would bring. Income taxes were enacted, and corporation and inheritance tax rates were increased. Even though local revenues had been more sharply hit than those of the states, the substitute taxes were not adapted to local administration. The states, therefore, in many cases shared the proceeds of these new taxes with the localities.[77] Consequently, the shared revenues which localities receive from these sources even at the present time must be added to direct and shared receipts from alcoholic beverage taxes in order to compare the pre-Prohibition local receipts with those of today.

(d) *Earmarking of Taxes.* State shares of alcoholic beverage taxes are often earmarked for specific purposes. Although it was strongly recommended that such receipts go to the general funds, this practice has not been generally followed. Twelve of the 32 license states have earmarked these revenues to the support of social welfare programs including old age pensions, relief of crippled and underprivileged

[72] U. S. Treas. Bull., Aug. 1939.
[73] *Public Revenues from Alcoholic Beverages*, 1937, 1938, 1939.
[74] *Financial Statistics of States 1937*, 50.
[75] MERLIN, AMERICAN TAXES SHARED AND ALLOCATED (Amer. Municipal Assn. and Fed. of Tax Administrators, 1938) 23.
[76] *Id.* 35.
[77] SHULTZ AND CAINE, *op. cit. supra* note 2, at 542.

children, charitable institutions, and schools.[78] Massachusetts and Tennessee reimburse localities for old age assistance expenditures with part of their collection. New York contributes a fixed amount to the New York City Police Pension Fund, and Louisiana requires localities to use a portion of their revenues for this purpose. Louisiana, Kansas, and North Dakota devote part of their total alcoholic beverage revenues to homestead exemption funds, while Wisconsin requires that receipts shared with localities go to reduce local property taxes. Minnesota's receipts go to the general fund but they must be used to redeem state certificates of indebtedness. Ten states require that collections go to the general fund for expenditure therefrom without any earmarking.[79]

Financing by means of earmarked revenues is open to criticism on several grounds. The operations may be outside the budget and for that reason it is difficult to plan a special program definitely tied up with the overall program of the state. Even where these receipts are estimated and carried in the budget, there is only a formal difference because if there are marked fluctuations in revenues in either direction, no administrative discretion may be exercised since amounts or percentages are fixed by statute.

Thus, when there is an excess of revenues over the actual requirements of the supported function, the money cannot be used for other purposes, and on the other hand, if revenues decline unexpectedly, the performance of the supported function may be severely handicapped.

While this is true of any earmarking finance, in some of the states it is especially dangerous. This is a consequence of the fact that the principal beneficiaries of these funds are various public welfare programs. Since a large part of the revenues are derived from excises on the sale of alcoholic beverages, it is probable that in subnormal years when larger numbers of people will require public assistance of one type or another, the sales of these products and consequently the revenues from them will decrease, just when they are most needed. An unexpected business decline of sharp proportions would no doubt play havoc with some of these programs.

Another objection to this type of finance is that pressure groups may exert influence on a particular branch of the tax system without regard for the balance and adjustment of the whole. This pressure may come from groups interested in the proceeds earmarked, or from other groups who may point to the desirable functions the funds support, in order to attain some end of their own. In the case of alcoholic beverage taxation there is the possibility that the amount of revenue which could be derived would be made the sole motivation of the tax program. Or even if other social considerations involved in alcoholic beverage taxation were taken into account, a legislature might find itself in the position of having to balance, according to their respective desirabilities, the merits of more liquor revenues to pay higher old age

[78] Data from the summary on allocation of revenues in *Public Revenues from Alcoholic Beverages* (1939). These states are Ariz., Ark., Colo., Fla., Ga., Nebr., Nev., N. M., Okla., S. C., Tex., Wis.

[79] Cal., Conn., Del., Ill., Ind., Ky., Miss., Mo., N. J., R. I.

pensions against the merits of uncontrolled traffic in spirits, for it would be on the latter basis that the most effective revenue yield would be forthcoming.

ADMINISTRATION OF ALCOHOLIC BEVERAGE TAXES

Alcoholic beverage taxes are on the whole administered by personnel experienced in the revenue field. The federal tax is administered by the United States Treasury Department through the Bureau of Internal Revenue and its Alcohol Tax Unit. In 30 of the states general revenue officials are the administrators[80] of the alcoholic beverage taxes, even though control and regulatory functions in connection with the traffic are vested in a liquor commission or other similar body.

Tax stamps are used by both the Federal Government and the states. Prior to 1866 the federal tax had been assessed on the basis of producers' returns. In the first year stamps were used the yield from the tax on fermented malt beverages rose from $3,657,000 to $5,115,000. It is estimated that in the period prior to the use of stamps, there was an annual evasion of approximately $6,400,000 in alcoholic beverage taxes of all types.[81]

Since 1935 the Federal Government has required brewers to install meters to measure the quantities of beer sent through their pipe lines for bottling. These pipe line meters are supplemented by racking meters. Production of alcoholic beverages is closely checked by the Federal Government which has employees stationed at the producing plants. Approval of plans for licensed manufacturing or storage premises are also required in order that possibilities of frauds on the revenue may be guarded against as much as possible.

In addition to the federal, state and local cooperation in enforcement problems, mention has been made of the regular exchange of information among the states on shipments leaving one state for delivery in another. Since in many states sales for shipment outside the state are not required to pay the excise tax, this practice of exchanging information provides a check both for the exporting state and the importing state. This administrative procedure has recently been strengthened in the midwest region by a further regulation that taxfree sales for shipment into other states would be made only to persons licensed or authorized by the receiving state to deal in alcoholic beverages.[82] This will, it is hoped, prevent most of the bootlegging over state lines because of tax rate differences.

SUMMARY

Although the combined taxes on alcoholic beverages are much higher than before Prohibition, they yield correspondingly higher amounts of revenue. While the present taxation of these beverages does not appear to favor the consumption of the lighter alcoholic beverages to the detriment of spirits, it evidently has operated to reduce the per capita consumption of both beer and spirits as compared with the pre-Prohibition

[80] Tax Administrators News, April 1940. [81] WELLS, *op. cit. supra* note 8, at 41.
[82] *Cooperative Commissions in Action* (April 1940) STATE GOVERNMENT 70.

years. At the same time the per capita consumption of wine is slightly above the average before Prohibition.

Despite the fact that there is no unanimity of opinion, there is reasonably convincing evidence to indicate effective enforcement of the liquor laws. Considering the high rates of tax that are imposed by both federal and state governments, the enforcement and revenue statistics are much more impressive than were predicted six or seven years ago when the matter of effective tax rates was considered in connection with pending legislation in Congress and in the state legislatures.

The Federal Government collects from these taxes about two and one half times the amount it did in normal years before Prohibition, while the states collect about ten times as much. These amounts constitute a smaller percentage of total federal tax revenues than in the prior period but a slightly larger percentage of total state tax collections. Taking into consideration direct collections and receipts from shared taxes and license fees on alcoholic beverages, together with receipts from other taxes shared as replacement revenues after Prohibition, the local governments receive about the same amounts today as they did before Prohibition. These revenues, however, furnish a very small portion of their total tax revenues.

It is a not uncommon practice for the states to earmark all or part of their alcoholic beverage tax revenues for the support of various social welfare programs. This seems to be undesirable both as a matter of budgetary practice and because of the danger of confusion of issues in determining what is most socially desirable for the community as a whole, especially where alcoholic beverage tax revenues are used for school or welfare programs.

INDEX—ALCOHOLIC BEVERAGE CONTROL*

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* F. A. A. and F. A. C. A. used in this index for Federal Alcohol Administration and Federal Alcohol Control Administration respectively.

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LAW OFFICES OF
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April 26, 1940

Shepard's Citations
The Frank Shepard Company
76-88 Lafayette Street
New York, N.Y.

Gentlemen:

I recently had a client bring a legal question to me on which I immediately told him that my general impression of the law covering the facts led me to believe that there was no chance of securing a recovery for him, but that I would check it again and report back to him. In briefing the law I had no difficulty in finding the cases —— some of them fairly recent ones —— which showed that the law was as I had expected to find it, as it was one of the old established principles in Wisconsin law. The Digest and Annotations contained no reference to anything that indicated that there had been any change.

Although the long acceptance of this rule of law led me to believe that I would secure nothing but the final satisfaction of knowing that I was not overlooking any recent change in making my usual last-step check, I, nevertheless, knowing the "glorious uncertainty of the law," followed my regular policy, reached for my Shepard's Citations, and was amazed to find that a very recent case had abandoned the old, long-established rule of law by taking another old, long-established rule of law and applying it to the facts to which they had formerly applied the first rule of law in their decisions, and had reached exactly opposite results on the same facts. This case permitted me to recover for my client. Without a set of your Citations in my office both my client and I would now be with considerably less "dollars" in our pockets.

An experience like that above set out, has earned your company my entire good will. I write this letter to let you know this and to assure you that I will be pleased to recommend your publication to any prospective purchaser that you may have in this vicinity at any time in the future.

Yours sincerely,

Lee H. Cranston

LHC:LEM